Supreme Court, U.S.
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No. 01-___

IN THE
Supreme Court of the United States

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
Petitioners,

v.

JOHN DOE,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a student sue a private university for damages under 42 U.S.C. § 1983 to enforce provisions of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, which disqualify from federal funding educational institutions that have a policy or practice of permitting education records to be released to unauthorized persons?

2. Does a private university act "under color of state law" when it does no more than provide information to a state official to meet a state requirement that it submit an affidavit attesting to a student's moral character?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners Gonzaga University and Roberta S. League were defendants in the trial court, appellants and cross-appeal respondents in the Court of Appeals, and respondents in the Washington Supreme Court. Respondent John Doe was the plaintiff in the trial court, respondent and cross-appellant in the Court of Appeals, and petitioner in the Washington Supreme Court. Susan Kyle and Julia Lynch were defendants in the trial court, appellants and cross-appeal respondents in the Court of Appeals, and respondents in the Washington Supreme Court. Petitioner Gonzaga University is a Washington non-profit corporation with no stock issued.

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PETITION FOR A WRIT OF CERTIORARI

Gonzaga University and Roberta S. League ("Gonzaga") respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington is reported at 24 P.3d 390, and reproduced in the appendix hereto ("App.") at 1a. The order of the Supreme Court of the State of Washington denying reconsideration is unreported, and reproduced at App. 29a. The opinion of the Court of Appeals of the State of Washington is reported at 992 P.2d 545, and reproduced at App. 30a.

JURISDICTION

The judgment of the Washington Supreme Court was entered on May 31, 2001. App. 1a. On August 10, 2001, the Washington Supreme Court denied Gonzaga's timely motion for reconsideration. App. 29a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

This case presents an issue under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g. That statute provides, in pertinent part:

* * *

> (1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein * * *) of students without the written consent of their parents to any individual, agency, or organization, other than [as set forth below].
>
> * * *
>
> (2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records [except as provided below].

20 U.S.C. § 1232g(b).

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person

> within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *.

INTRODUCTION

Before the decision below, no reported case had held that a private education institution could be sued for damages under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. This case presents the question whether a private litigant can use 42 U.S.C. § 1983 to impose liability on a private institution that attempts to report to state teacher-licensing authorities allegations that a future teacher violently and repeatedly sexually assaulted a fellow student. The Washington Supreme Court reinstated a $450,000 compensatory and punitive damage verdict for the alleged assailant, even though FERPA provides no express private right of action and nowhere evinces the unambiguous Congressional intent required to use § 1983 against a private university in these circumstances.

This Court's review is plainly warranted. The decision below cannot be reconciled with the approach required by this Court's precedents to determine whether a federal statute creates individual rights privately enforceable under § 1983, and there is a direct conflict between the Washington Supreme Court and other federal and state courts that have addressed the issue.

STATEMENT OF THE CASE

Background

This § 1983 case arises out of a teacher-in-training's claim that Gonzaga (a private Jesuit university located in Washington state) violated his rights under FERPA because members of its faculty discussed with a state investigator another student's accusation that he sexually assaulted her.

As the Washington Supreme Court acknowledged, in 1993 petitioner Roberta League, the certification specialist at Gonzaga's school of education, and Dr. Susan Kyle, director of field experience for student teachers at Gonzaga, heard reports from student Julia Lynch that respondent John Doe[1] – a school of education student – sexually assaulted student Jane Doe. App. 2a-3a. According to League and Kyle, Lynch reported that Jane Doe told her that John Doe sexually assaulted Jane Doe three times and coerced her into "aberrant sexual behavior." App. 4a. When Kyle approached her, Jane Doe refused to make a formal statement about the allegations and would not comment on her relationship with John Doe, stating, according to Kyle, "I guess I don't really know what date rape is," and "I promised [John Doe] I wouldn't tell. He made me promise." App. 5a.

As the Washington Supreme Court further acknowledged, other Gonzaga faculty members testified that Jane Doe told them about John Doe's behavior. App. 5a. The department chair, Janet Burcalow, testified that Jane Doe admitted being afraid of what might happen if John Doe discovered that she talked about their relationship, and urged Burcalow not to pursue the matter. App. 6a.

Other evidence, also acknowledged by the Washington Supreme Court, corroborated that testimony. John Doe admitted having intercourse with Jane Doe but claimed it was consensual. App. 7a. Yet he admitted that Jane Doe told him that a medical professional concluded that "the intercourse appeared forced." App. 4a.

Washington State Board of Education regulations, in effect at the time, governed the teacher certification process. They required a designated official of an applicant's school to

[1] Although respondent's identity was made public during proceedings below, we follow the Washington Supreme Court in referring to him as John Doe and to the student he allegedly assaulted as Jane Doe. *See* App. 2a.

consult faculty members who knew the applicant, and to swear that the school official and consulted faculty members had "no knowledge that the applicant has been convicted of any crime and no knowledge that the applicant has a history of any serious behavioral problems." Wash. Admin. Code 180-75-082(3) (1997) (repealed effective Mar. 8, 1997).[2]

Concerned that these events might affect the dean's ability to submit an affidavit supporting John Doe's application for teacher certification, League discussed the matter with Adelle Nore, a senior investigator with the Office of the Superintendent of Public Instruction (OSPI), the state agency that regulates teacher education programs in Washington. Other Gonzaga personnel also contacted Nore concerning the allegations against John Doe. During one contact, League gave Nore John Doe's name.

Respondent's state law defamation claims were based on Gonzaga's internal documentation of these sexual misconduct allegations, and on the facts reported to OSPI. His FERPA claim is premised entirely on disclosure to OSPI of his name and the reported allegations.

Pursuant to the pertinent board of education regulation, the Gonzaga school of education dean, Dr. Corinne McGuigan, eventually concluded that sufficient evidence of a serious behavior problem precluded her from signing the affidavit supporting John Doe's application for teacher certification. Gonzaga never provided OSPI an affidavit regarding John Doe.

[2] The provision that replaced section 180-75-082 of the Washington Administrative Code similarly requires a teacher certification applicant's school of education to submit an affidavit attesting to "the applicant's character or fitness." Wash. Admin. Code 180-79A-155(3).

Proceedings Below

John Doe sued Jane Doe for defamation and Gonzaga for defamation, negligence, and breach of educational contract. John Doe later added the individual defendants as well as a § 1983 claim, against Gonzaga and the individual defendants, that alleged violation of FERPA for releasing his name to OSPI.

At trial, Gonzaga moved for judgment as a matter of law on the FERPA claim. Gonzaga argued that FERPA creates no right or privilege that private parties may enforce under § 1983 and that Gonzaga's challenged conduct was not in any event under color of law. The trial court denied the motion.

A jury returned a verdict for John Doe on all five theories of recovery and awarded him a total of $1,155,000 in damages. App. 9a. In connection with the FERPA claim, the jury awarded $150,000 in compensatory and $300,000 in punitive damages. *Id.* The trial court entered judgment on the verdict and awarded John Doe attorneys' fees and costs. *Id.*

Gonzaga appealed the denial of its motions and the judgment. On appeal Gonzaga argued, among other things, that FERPA may not be enforced by private actions under § 1983 and that its challenged conduct was not under color of law.

The Washington Court of Appeals reversed the judgment on all five of John Doe's claims, including the FERPA claim. App. 53a. The Court of Appeals held that "FERPA does not create individual rights privately enforceable under 42 U.S.C. § 1983." App. 47a. FERPA, the court noted, provides that federal funds be unavailable to an education institution that "has a policy or practice of permitting the release of education records" without consent. *Id.* (quoting 20 U.S.C. § 1232g(b)). "Like the federal law at issue in [*Blessing* v. *Freestone*, 520 U.S. 329 (1997)]," the court concluded, FERPA requires that schools "have in place a system-wide

plan; the law is not intended to ensure that 'the needs of any particular person have been satisfied.' " *Id.* (quoting *Blessing*, 520 U.S. at 343). The Washington Supreme Court granted John Doe's petition for review.

The Washington Supreme Court Decision

On petition for review, the Washington Supreme Court addressed the question "[w]hether FERPA creates any right or privilege which can be enforced by individuals under 42 U.S.C. sec. 1983." App. 11a. Although the court acknowledged that "FERPA itself does not give rise to a private cause of action," App. 19a, it nonetheless concluded that "the FERPA provision at issue here gives rise to a federal right enforceable under section 1983." App. 20a.

The Washington Supreme Court purported to analyze the § 1983 enforceability question under the "three-factor test" this Court applied in *Blessing*. *Id.* Specifically, the court asked "(1) whether Congress intended the provision in question to benefit the plaintiff; (2) whether the right protected by the statute is so 'vague and amorphous' that its enforcement would strain judicial competence; and (3) whether the statute imposes a binding obligation on the states." App. 19a-20a. Reviewing each factor, the court found that FERPA "is intended to benefit students"; that "the right is not so 'vague and amorphous' that the court cannot enforce it"; and that "the FERPA provision provides a binding obligation." App. 20a. Based on that analysis, the court concluded that John Doe was entitled to bring a FERPA claim against Gonzaga under § 1983.

In so holding, the court failed to follow this Court's directly pertinent precedents. In *Suter* v. *Artist M.*, 503 U.S. 347 (1992), this Court made clear that the overriding concern in determining whether a federal statute creates rights enforceable under § 1983 is whether the statutory language "unambiguously confer[s] an enforceable right upon the Act's beneficiaries * * * ." *Id.* at 363; *see id.* at 357 (same).

Yet the Washington Supreme Court failed to apply the analysis of *Suter*, and failed to find that FERPA *unambiguously* confers such a right. Indeed, the court's only citation to *Suter* came in a footnote that implicitly criticized the Washington Court of Appeals' reliance on that decision. App. 20a n.11.

The Washington Supreme Court also failed to acknowledge the substantial authority that directly conflicts with its decision. And the court cited no cases that have upheld a FERPA claim, under § 1983 or otherwise, against a private university, or any non-public education institution.

Finally, the court held that although Gonzaga is a private university, it was subject to § 1983 because "Gonzaga acts for the State when it completes the moral affidavit for a student." App. 22a. The court reversed the Court of Appeals and remanded with instructions to reinstate the judgment on all of John Doe's claims – including both compensatory and punitive damages on the FERPA claim – except the negligence claim, which, it held, should be dismissed. App. 28a.[3]

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW FAILED TO APPLY THE STANDARD ANNOUNCED IN *SUTER*, AND CONFIRMED IN *BLESSING*, THAT A PLAINTIFF HAS A "RIGHT, PRIVILEGE OR IMMUNITY" ENFORCEABLE UNDER SECTION 1983 ONLY IF CONGRESS UNAMBIGUOUSLY INTENDED TO CONFER AN INDIVIDUAL RIGHT TO ENFORCE A REQUIREMENT OF FEDERAL LAW.

1. Although the Washington Supreme Court properly recognized that FERPA itself confers no private cause of

[3] The Washington Supreme Court stayed the judgment on the FERPA claim pending this petition and any subsequent proceedings in this Court. Petitioners have satisfied the judgment with respect to the non-FERPA claims.

action, the court held that respondent could nonetheless bring this action under § 1983. Whether FERPA is enforceable by private § 1983 actions is a question of first impression in this Court. Based on the Court's recent pertinent decisions, however, it is clear that Congress did not indicate the requisite intent to authorize private suits under § 1983 to enforce FERPA.

In *Suter* v. *Artist M.*, the Court significantly narrowed the category of federal statutes enforceable under § 1983, announcing the required question: "Did Congress, in enacting the [statute], unambiguously confer upon the * * * beneficiaries of the [statute] a right to enforce the requirement" at issue? 503 U.S. at 357. Where, as in *Suter* and here, Congress imposes obligations on states pursuant to its spending power, " '[t]he legitimacy of Congress' power to legislate * * * rests on whether the State voluntarily and knowingly accepts the terms of the 'contract,' " and there can be "no knowing acceptance if a State * * * is unable to ascertain what is expected of it." *Id.* at 356 (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)) (citations and footnote omitted). Thus, under *Suter*, for a court to find in FERPA a private enforcement right under § 1983, Congress's intent to confer such a right must be "unambiguous[ ]". *Id.* at 357. *See Arkansas Med. Soc'y, Inc.* v. *Reynolds*, 6 F.3d 519, 525 (8th Cir. 1993); *Stowell* v. *Ives*, 976 F.2d 65, 70 (1st Cir. 1992).

After *Suter*, it is no longer sufficient to show that the plaintiff benefits generally from a requirement that a federal funds recipient must adhere to a federal statutory policy. Although the statute in *Suter* required state recipients of federal funds to adopt plans regarding removal of children from and return to their homes, and although those requirements unquestionably benefited children, the federal law, the Court held, did not give any child an enforceable right under § 1983. 503 U.S. at 352, 358, 363.

In *Blessing* the Court confirmed that rule in holding that a statute conditioning receipt of federal funds on compliance with federal child support principles did not confer a § 1983 right. 520 U.S. at 343. Section 1983 rights might have been conferred, the Court noted, had the statute required mandatory payments to children that the state had failed to make. *Id.* at 345-346. The Court emphasized the difference between a statute that "creat[es] an *individual* entitlement" and one that regulates "*systemwide* performance." *Id.* at 343 (emphasis in original). The Court also emphasized that the statute provided no enforcement mechanism to "command the State to take any particular action," but instead provided only for reduction of federal funding in the event of "substantial noncompliance." *Id.* at 344.

FERPA's text reveals utterly no Congressional intent – and certainly not the "unambiguous[ ]" intent *Suter* requires – to permit private enforcement of the provision at issue here. [4] Nothing in the statute placed states or, for that matter, private universities, on notice that individual alleged instances of unconsented disclosure of education records would subject them to private damages actions by students and parents. To

[4] Courts uniformly have held that FERPA itself provides no private right of action. *See Fay* v. *South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986); *Tarka* v. *Cunningham*, 917 F.2d 890, 891 (5th Cir. 1990); *Klein Indep. Sch. Dist.* v. *Mattox*, 830 F.2d 576, 579 (5th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988); *Girardier* v. *Webster College*, 563 F.2d 1267, 1276-77 (8th Cir. 1977); *Tarka* v. *Franklin*, 891 F.2d 102, 104 (5th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990); *Hartfield* v. *East Grand Rapids Pub. Schs.*, 960 F. Supp. 1259, 1264 (W.D. Mich. 1997); *Doe* v. *Knox County Bd. of Educ.*, 918 F. Supp. 181, 184 (E.D. Ky. 1996); *Odom* v. *Columbia Univ.*, 906 F. Supp. 188, 195 (S.D.N.Y. 1995); *Belanger* v. *Nashua, N.H., Sch. Dist.*, 856 F. Supp. 40, 43 n.4 (D.N.H. 1994); *Rothman* v. *Emory Univ.*, 828 F. Supp. 537, 542 (N.D. Ill. 1993); *Norris by Norris* v. *Board of Educ. of Greenwood Cmty. Sch. Corp.*, 797 F. Supp. 1452, 1462 (S.D. Ind. 1992); *Norwood* v. *Sammons*, 788 F. Supp. 1020, 1026 (W.D. Ark. 1991); *Smith* v. *Duquesne Univ.*, 612 F. Supp. 72, 80 (W.D. Pa. 1985), *aff'd without op.*, 787 F.2d 583 (3d Cir. 1986).

the contrary, the pertinent section of FERPA simply provides, subject to various conditions and exceptions, that "[n]o funds shall be made available * * * to any educational agency or institution which has a policy or practice of permitting the release of education records * * *." 20 U.S.C. § 1232g(b)(1). FERPA thus merely conditions the availability of federal funds on an institution not having such a policy or practice. *Francois* v. *University of D.C.*, 788 F. Supp. 31, 33 (D.D.C. 1992), *aff'd*, 1993 WL 32350 (D.C. Cir. 1993). FERPA creates no individual enforcement right for particular instances of disclosure.

Further, as in *Blessing*, FERPA contains no mechanism for sanction of individual disclosures of student information. The Secretary of Education cannot "command the State to take any particular action," but is authorized only to terminate federal funding. That no Secretary has ever exercised that extraordinary authority confirms that the Department of Education consistently has interpreted FERPA to authorize sanctions only when noncompliance is systemic, chronic, and extreme. *See* John Lowery, *LeRoy Rooker on FERPA as a defender of education and privacy rights on today's college campuses*, 10 Synthesis: Law and Policy in Higher Education 716, 731 (1998).

The Washington Supreme Court erred in failing to apply the requirement, announced in *Suter* and confirmed in *Blessing*, that Congress must "unambiguously" have intended to confer private rights under the statutory provision at issue. Having failed that test, a statute cannot confer § 1983 rights even if, as the Washington Supreme Court stated, the statute nominally conformed to the three-part test announced in *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498, 509 (1990) ((1) whether the provision in question was intended to benefit the plaintiff; (2) whether the right protected by the statute is so "vague and amorphous" that its enforcement would strain judicial competence; and (3) "whether the statute imposes a binding obligation on the State").

Indeed, application of the *Wilder* test, in light of *Suter* and *Blessing*, clearly reveals that the requisite expression of Congressional intent is absent from FERPA. First, the pertinent FERPA provisions require only that participating institutions have a system-wide plan in place that does not permit unconsented release of education records or personally identifiable information. 20 U.S.C. § 1232g(b). FERPA does not by its terms protect individual students against particular disclosures. "FERPA was adopted to address systematic, not individual, violations of students' privacy and confidentiality rights * * *." *Smith*, 612 F. Supp. at 80. Because Congress addressed institution-wide policies and practices, not particular disclosures, it is evident that Congress did not intend to ensure that "the needs of any particular person have been satisfied." *Blessing*, 520 U.S. at 343. Nor does the statute "bind[ ]" the state or private recipients by putting them on notice that *they*, rather than the U.S. Department of Education, are responsible for providing remedies to students for particular instances of disclosure of education records by individual university personnel. *See Suter*, 503 U.S. at 357. Finally, if FERPA creates enforceable individual rights, those rights are undoubtedly "vague and amorphous," because the statute does not specify what obligations education institutions and agencies have to prevent *individual* violations; it conditions federal funding only on recipients' not having certain *policies or practices*.

With respect to individual students, Congress did express an unambiguous intention when it enacted FERPA. That intention, rather than conferring rights on individuals to go to court, made available an extensive administrative mechanism, through the U.S. Department of Education, for redress *by government* of students' claims.[5] *See Norris*, 797 F. Supp.

[5] *See* 20 U.S.C. § 1232g(f) (authorizing the Secretary of Education to "deal with violations of this section"); *id.* § 1232g(g) (requiring the Secretary to "establish or designate an office and review board" for "investigating, processing, reviewing and adjudicating violations of [FERPA] and complaints which may be filed concerning alleged violations of [FERPA]"); 34 C.F.R. § 99.60 (establishing the Family Policy Compliance Office ("FPCO") and designating the Office of Administrative Law Judges to act as review board); *id.* §§ 99.21, 99.22 (establishing a process for institutional review board adjudication of individual FERPA grievances); 20 U.S.C. § 1232g(g) (permitting parents and eligible students to file written complaints with FPCO regarding alleged FERPA violations); 34 C.F.R. § 99.63 (same); *id.* §§ 99.64 – 99.67 (setting forth detailed procedures for FPCO review of student complaints and for enforcement of FPCO determinations).

at 1465. Respondent never attempted to avail himself of that process.[6]

The same concerns that made the *Suter* Court highly reluctant to construe Spending Clause legislation as conferring privately enforceable individual rights apply with at least equal force to the Spending Clause statute at issue here. Legislation enacted under the Spending Clause is in the nature of a contract: states agree to comply with federally imposed conditions in exchange for federal funds. *Pennhurst State Sch. & Hosp.*, 451 U.S. at 17. Plaintiffs in cases like this one are not parties to the contract. *Blessing*, 520 U.S. at 349 (Scalia, J., concurring). They are at most third-party beneficiaries. As such, they were not entitled, under the law at the time § 1983 was enacted, to sue upon the contract. *Id.* at 350 (citing 1 William W. Story, *A Treatise on the Law of Contracts* 549-550 (4th ed. 1856)). Here, accordingly, respondent has no right of action under § 1983 because his ability to compel Gonzaga to make good on its promise to the

[6] Respondent never filed a complaint with the Secretary or FPCO concerning the circumstances in this case. Instead, he simply included counts alleging a FERPA violation among the multiple state law claims in his state court lawsuit. Adding the FERPA claim, which was based on substantially the same alleged conduct as his defamation claim, enabled respondent to receive punitive damages, which were not available under his state law defamation and contract claims. *See Schmalenberg* v. *Tacoma News, Inc.*, 943 P.2d 350, 363 (Wash. Ct. App. 1997), *review denied*, 958 P.2d 314 (Wash. 1998).

Federal Government was not a "righ[t] * * * secured by the * * * laws" under § 1983. *Id.*

II. THE DECISION BELOW EXACERBATES A CONFLICT AMONG FEDERAL COURTS.

1. The decision below also conflicts with the holdings of federal and other state courts on the question presented. In *Gundlach* v. *Reinstein*, 114 F.3d 1172 (3d Cir. 1997), the Third Circuit summarily affirmed a district court decision that barred "redress pursuant to a FERPA-based § 1983 claim." *Gundlach*, 924 F. Supp. 684, 692 (E.D. Pa. 1996). The district court, noting "*Suter*'s mandate that the statute at issue be read strictly with an eye toward gleaning its precise requirements," found "no unambiguous intention on the part of the Congress to permit the invocation of § 1983 to redress an individual release of records allegedly covered by FERPA." *Id.* at 691, 692. The Third Circuit has consistently affirmed district court rulings that "FERPA was adopted to address systematic, not individual, violations of students' privacy and confidentiality rights * * * ." *Smith* v. *Duquesne Univ.*, 612 F. Supp. at 80.

Other courts, too, that have properly applied this Court's precedents have held that an alleged violation of FERPA does not give rise to a private § 1983 action. *Meury* v. *Eagle-Union Cmty. Sch. Corp.*, 714 N.E.2d 233, 239 (Ind. Ct. App. 1999) ("The enforcement provisions within FERPA explicitly provide that the Secretary of Education is solely responsible for enforcement, thereby preempting a private cause of action [under § 1983]."); *Norris*, 797 F. Supp. at 1465 ("The statutory basis [FERPA] alleged for Plaintiff's claim is insufficient/ to support a § 1983 action for damages."); *Joseph M. ex. rel. Kimberly F.* v. *Southeast Delco Sch. Dist.*, 2001 WL 283154, at *10 (E.D. Pa. Mar. 19, 2001) (denying request for relief under § 1983 to enforce FERPA, citing *Suter* and *Gundlach*).

As these cases illustrate, since *Suter* it has been clear that "when a provision in a statute fails to impose a direct obligation on the States, instead placing the onus of compliance with the statute's substantive provisions on the federal government, no cause of action cognizable under section 1983 can flourish." *Stowell* v. *Ives*, 976 F.2d at 70. The FERPA provisions at issue here fall squarely in that category. By FERPA's express terms, Congress set forth a comprehensive mechanism according to which the U.S. Secretary of Education has sole authority to investigate and remedy student and parent allegations of FERPA violations. As the post-*Suter* courts recognize, "FERPA provides expressly that the Secretary of Education is responsible for enforcing the provisions and protections of FERPA; Section 1983 does not create a private right of action for damages where the federal statute provides an exclusive administrative enforcement mechanism." *Norris*, 797 F. Supp. at 1465.

The only federal court of appeals decisions to the contrary either pre-dated *Suter*, and thus applied the more lenient test of the Court's earlier cases, *see Tarka* v. *Cunningham*, 917 F.2d 890, or post-dated *Suter* but simply failed to apply the standard *Suter* requires. *See Falvo* v. *Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1203, 1211 n.6 (10th Cir. 2000) (holding that "any analytical additions announced in *Suter* are no longer to be followed") (citation and internal punctuation omitted), *cert. granted*, 121 S. Ct. 2547 (2001); *Brown* v. *City of Oneonta*, 106 F.3d 1125 (2d Cir. 1997) (failing to apply the controlling analysis of *Suter*); *see also Maynard* v. *Greater Hoyt Sch. Dist. No. 61-4*, 876 F. Supp. 1104, 1107 (D.S.D. 1995) (noting that no federal appellate court to date had addressed the issue under the "post-*Suter* framework"); *Achman* v. *Chisago Lakes Indep. Sch. Dist. No. 2144*, 45 F. Supp. 2d 664, 673 n.10 (D. Minn. 1999) (refusing to apply *Suter* analysis). Given the inconsistent application of this Court's precedents, it should come as no surprise that "there is a split of authority over whether FERPA can form the basis

of a claim under section 1983." *Goodreau* v. *Rector & Visitors of Univ. of Va.*, 116 F. Supp. 2d 694, 707 (W.D. Va. 2000).

2. The cases analyzing the enforceability of FERPA under § 1983 also underscore the confusion among lower courts on the broader question of the proper test to determine whether a federal statute may be enforced in a § 1983 action. At least one court concluded that in *Suter* "the Court appeared to abandon the framework established in * * * *Wilder*." *Belanger* v. *Nashua, N.H., Sch. Dist.*, 856 F. Supp. at 43. Another held that *Suter* added "additional considerations" to the *Wilder* approach. *Arkansas Med. Soc'y*, 6 F.3d at 525. Others held it "possible to synthesize the teachings of *Suter* with the Court's prior precedents." *Stowell*, 976 F.2d at 68. *See Harris* v. *James*, 127 F.3d 993, 1002 (11th Cir. 1989) (noting federal courts of appeals' "divergent views" on the effect of *Suter* on *Wilder*). And one held that "analytical additions announced in *Suter* are no longer to be followed." *Falvo*, 233 F.3d at 1211 n.6 (citation and internal punctuation omitted). This Court's review in this case would permit it to resolve this widespread confusion over the proper standard to apply in deciding such § 1983 claims.

3. The Court's decision in *Owasso Independent School District No. I-011* v. *Falvo*, No. 00-1073 (cert. granted June 25, 2001), is likely to have an impact on the issue presented in this case. Because the Court's opinion in *Falvo* – its first opportunity to consider FERPA – may well shed important light on the question whether FERPA may be enforced in a private damages action under § 1983, the Court should at least hold this case pending decision in *Falvo*.

In *Falvo*, the Tenth Circuit held that parents of students could sue the defendant school district under § 1983 for an alleged violation of FERPA. Although the parties did not raise on appeal whether private § 1983 actions may enforce FERPA, the Tenth Circuit addressed the issue because

"[w]hether the alleged violation of FERPA is actionable under 42 U.S.C. § 1983 * * * may implicate this court's and the district court's jurisdiction * * *." 233 F.3d at 1210 (citing *Duke* v. *Absentee Shawnee Tribe Housing Auth.*, 199 F.3d 1123, 1125 (10th Cir. 1999), *cert. denied*, 529 U.S. 1134 (2000); *Ackerley Communications of Fla., Inc.* v. *Henderson*, 881 F.2d 990, 993 (11th Cir. 1989)).

This Court granted certiorari to decide whether FERPA prohibits teachers from requiring students to grade each others' papers in class. In reviewing FERPA for the first time since its enactment, the Court, even if it does not address directly whether FERPA may be enforced by private § 1983 actions, may well decide issues pertinent to that question. For example, the Court in *Falvo* may well need to consider whether disclosures not pursuant to an institutional policy or practice violate FERPA, whether Congress intended FERPA to benefit the plaintiffs, and whether the FERPA rights allegedly violated were vague and ambiguous – questions directly pertinent to the Washington Supreme Court's ruling in this case. *See* App. 20a.

The Court thus should at a minimum hold this case and, if the Court's opinion in *Falvo* might affect the decision below in this case, grant certiorari in this case, vacate the judgment, and remand for reconsideration.

4. The decision below also conflicts with well-established authority holding that private actors' conduct is not subject to § 1983 merely because those actors make recommendations to the state. The Washington Supreme Court stood that principle on its head when it held that Gonzaga acted "under color of state law" because university personnel complied with a state law requirement that a university official submit moral character affidavits to OSPI. App. 22a. The only authority the court cited for that holding was a case in which it held that to be a state actor "[i]t is enough that [a private person] is a willful participant in joint action with the state or

its agents." *Id.* (quoting *Kuehn* v. *Renton Sch. Dist. No. 403*, 694 P.2d 1078 (Wash. 1985)). The court's ruling conflicts with the weight of authority, which holds that private actors are not transformed into state actors whenever the state relies on their recommendations or certifications.

A private party is not transformed into a state actor under the "joint action" theory merely by supplying information that pertains to a governmental decision. *See NCAA* v. *Tarkanian*, 488 U.S. 179, 195-96 (1988). Rather, the "joint action" is "under color of state law" if the state has essentially delegated to the private actor the power to make the decision for the state. *Id.* at 197 ("[T]he NCAA did not – indeed, could not – directly discipline Tarkanian or any other state university employee."); *Sigmon* v. *CommunityCare HMO, Inc.*, 234 F.3d 1121, 1127 (10th Cir. 2000) (state contractor that recommended placement of state employee in drug treatment program did not act under color of state law); *Johnson* v. *Educational Testing Serv.*, 754 F.2d 20, 24 (1st Cir.) (private organization that tests and reports scores of teachers to state licensing authorities is not state actor: "ETS merely reports test scores and lacks authority to decide who shall be admitted and who shall be rejected"), *cert. denied*, 472 U.S. 1029 (1985); *Langston* v. *ACT*, 890 F.2d 380, 384-385 (11th Cir. 1989) (test-provider not a state actor although public universities rely on its tests to evaluate students); *Gilliam* v. *National Comm'n for Certification of Physician Assistants, Inc.*, 727 F. Supp. 1512, 1514 (E.D. Pa. 1989) (private organization not state actor even though "its certifications are relied upon by many states in their licensing decisions"), *aff'd*, 898 F.2d 140 (3d Cir.), *cert. denied*, 495 U.S. 920 (1990); *Sammons* v. *National Comm'n on Certification of Physician Assistants, Inc.*, 104 F. Supp. 2d 1379, 1382-83 (N.D. Ga. 2000) (same).

Here, Gonzaga had no authority to determine who would be certified to teach. Rev. Code Wash. § 28A.410.010 - .240 (state retains authority to impose detailed certification

requirements); Wash. Admin. Code § 180-75-017 (1997) (moral character affidavit from school not required). While a private actor's conduct may constitute state action where the state "has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity," *Burton* v. *Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961), the mere act of providing – or, as here, declining to provide – a recommendation to the state is not sufficient to convert a private party into an arm of the state. The Washington Supreme Court determination that Gonzaga was a state actor merely because its personnel submitted moral character affidavits to the state thus conflicts with this Court's precedents as well as decisions of the First, Tenth, and Eleventh Circuits and other federal courts.

5. This case presents a federal question of profound importance to thousands of education institutions throughout the nation. If FERPA is interpreted to permit private suits under § 1983, litigation in federal courts will proliferate. Since its enactment, FERPA has been subject to an extraordinary volume and variety of interpretations by students and parents. FPCO has issued hundreds of opinion letters that interpret the statute. *See* Dixie Snow Huefner & Lynn M. Daggett, *Commentary: FERPA Update: Balancing Access to and Privacy of Student Records*, 152 Ed. Law Rep. 469, 470 (2001); *see id.* ("What once seemed like a relatively straightforward statute has become a cumbersome set of requirements with ambiguous parameters."). Permitting a private right of action to enforce FERPA's extensive requirements would invite complainants to litigate in courts throughout the nation FPCO's voluminous technical interpretations of a statute that covers millions of students.

Under the ruling below, colleges and universities may be subject to suits for compensatory and punitive damages by students whenever law enforcement and other governmental authorities direct them to disclose student records. Although

FPCO has held that disclosure of student records in some such circumstances may fall within FERPA's "health or safety emergency" exception, *see* Andrea L. Foster, *Education Dept. Eases Student-Privacy Rules for FBI's Terrorism Investigation,* Chronicle of Higher Educ., Today's News (Sept. 21, 2001), *at* http://www.chronicle.com/daily/2001/09/20010921n.htm, a court or jury would not, of course, be bound by such a determination and could find a FERPA violation under specific facts. This Court should grant certiorari in this case to make clear that colleges and universities that comply with FPCO policy do not face a risk of additional, substantial damages in private FERPA suits.

The holding below would vastly expand the scope of private conduct subject to challenge in § 1983 suits. If private organizations are deemed to act under color of law whenever they make recommendations or certifications that may or may not be relied on by state entities, a broad array of private testing organizations, professional societies, and virtually every private college and university would be subject to claims under § 1983. That result would be contrary to precedent, destructive to the private organizations' freedom, and an open floodgate for lawsuits.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME COURT OF WASHINGTON,

En Banc.

JOHN DOE,

Petitioner,

v.

GONZAGA UNIVERSITY, a Washington nonprofit corporation, JULIA M. LYNCH, ROBERTA S. LEAGUE, and SUSAN J. KYLE,

Respondents.

No. 69456-7

Argued Jan. 18, 2001
Decided May 31, 2001

IRELAND, J.

Petitioner John Doe sought review of a Court of Appeals' decision reversing the jury's award of damages (based on claims of defamation, negligence, invasion of privacy, violation of his rights under the Family Educational Rights and Privacy Act of 1974 (FERPA), and breach of contract) and remanding the case for retrial solely on the defamation claim.

We hold that the jury was properly instructed and that there is substantial evidence to sustain the jury's verdict on the defamation, invasion of privacy, violation of FERPA, and breach of contract claims. Because Gonzaga had no duty to investigate allegations against John Doe, there is no cognizable claim for negligence. Therefore, the Court of Appeals' decision is affirmed in part and reversed in part. The case is remanded to reinstate the judgment on all claims except negligence, which is to be dismissed.

FACTS

The witnesses presented widely divergent accounts of the facts in this case.

In late 1992, while John Doe was an elementary education student at Gonzaga University (Gonzaga), he had a sexually intimate relationship with Jane Doe, a student who was studying special education at Gonzaga. [1]

In October 1993, Roberta League (League), Gonzaga's teacher certification specialist, overheard student Julia Lynch (Lynch) talking with another student about Lynch's dissatisfaction with the way the school dealt with complaints of date rape. Lynch said that when she had been a resident assistant, she had observed Jane Doe in obvious physical pain, which Jane Doe said was the result of having sex with "John." Lynch was angry that no one from Gonzaga had bothered to find out what had happened.

League recognized the name "John"; she knew John Doe was a student teacher in the education program at Gonzaga. Two days later, League told Dr. Susan Kyle (Kyle),

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[1] Although the real names of the plaintiff and his sexual partner appear in the trial transcript, the plaintiff filed suit as "John Doe" and is so denominated here. As in the Court of Appeals' decision, John Doe's partner is identified as "Jane Doe."

Gonzaga's director of field experience for student teachers, what she had overheard. Kyle and League decided that they needed to investigate the situation. [2] League was concerned that the allegations she had overheard about John Doe might affect the dean's ability to submit an affidavit supporting John Doe's application for teacher certification. [3]

The two women met with Lynch on October 14, 1993. According to Lynch, Jane Doe told Lynch that John Doe had sexually assaulted her three times in late November or December 1992. Lynch also said that she accompanied Jane Doe to the student health center soon after the last assault, and the nurse concluded that Jane Doe had been date raped. [4]

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[2] Trial testimony showed that the investigation eventually included the following Gonzaga personnel: Julia Lynch, Chris Earnest, Roberta League, Susan Kyle, Janet Burcalow, Corrine McGuigan, Jon Sunderland, John Balog, Colleen Farrell, Sue Weitz, Kermit Rudolf, Father Coughlin, Vicki Loveland, Maureen Sheridan, William Sweeney, Vicki Howard, Cheryl Lepper, Tim McLaughlin, and Leo Driscoll.

[3] Applicants for certification are required to demonstrate their character and fitness for teaching, including a questionnaire, a fingerprint check, and an affidavit from the dean of the college or the school of education. The dean is to certify under penalty of perjury as follows:

> I swear (or affirm) that several faculty members have been contacted who personally know or knew _____, who is a candidate for certification. They have no knowledge and I have no knowledge that the applicant has been convicted of any crime or has a history of any serious behavioral problems.

Br. of Appellants at 5.

[4] At trial, Nurse Vicki Olson (Olson) testified that she did not perform a physical examination of Jane Doe. She recorded Jane Doe's subjective symptoms and scheduled an appointment for her

According to League and Kyle, Lynch said that Jane Doe claimed John Doe verbally coerced her into participating in "aberrant sexual behavior" with "other objects besides his penis," and urged Jane Doe to engage in multiple partner sex. [5] Clerk's Papers (CP) at 98, 195.

At the conclusion of the meeting, League and Kyle asked Lynch to see if Jane Doe would speak with them about her relationship with John Doe. Lynch did, and Jane Doe became angry and told Lynch that she did not want to make a complaint. Lynch told Kyle and League of Jane Doe's response.

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with Dr. Nancy Crotty (Crotty). When Olson asked Jane Doe if she wanted to report a rape, Jane Doe said no. Crotty testified that when she examined Jane Doe the following day, her findings were consistent with intercourse. Crotty testified that Jane Doe did not accuse John Doe of date rape or sexual assault. Crotty suggested that Jane Doe seek counseling if she felt that she had been unwillingly involved in intercourse. John Doe testified that Jane Doe told him the nurse or doctor had said the intercourse appeared forced. When John Doe asked Jane Doe, "Well, was it?", she responded, "I don't know. Was it?" Report of Proceedings (RP) at 366, 536.

[5] Lynch testified at trial that the conduct Jane Doe had described to her was normal, nonaberrant sexual activity. Lynch, League, and Kyle could not say at the time of trial what they discussed that led to references in the Kyle and League declarations to seamy and deviant activities and sexual penetration with foreign objects. Kyle admitted that she may have misunderstood, and that Lynch may only have spoken of John Doe's wanting to date two women simultaneously – not of proposing menage a trois. The women's conversation included discussion of whether there were erotic pictures in his room, whether John Doe was circumcised, and how often he changed his condoms.

League also contacted Adelle Nore, an investigator for the Office of the Superintendent of Public Instruction (OSPI), the state agency which certifies teachers. League and other Gonzaga personnel spoke with Nore by telephone numerous times about the allegations of John Doe's sexual misconduct, and League identified John Doe to Nore by name.

Nore testified that she believed Gonzaga personnel needed to speak with both John Doe and Jane Doe about the allegations. However, Gonzaga personnel did not ask her for her advice and did not tell Nore that they had not talked to John Doe. It was Nore's understanding in her conversations with League and Kyle that the alleged victim was credible and prepared to make a statement.

On October 28, 1993, Kyle met with Jane Doe, and told her about the date rape allegations. During the meeting, Jane Doe stated, "I guess I don't really know what rape is," and "I promised [John] I wouldn't tell." CP at 99. Jane Doe refused to make a formal statement.

After leaving Kyle's office, Jane Doe talked with Professor William Sweeney (Sweeney), who later described her as near hysteria and weeping uncontrollably. Sweeney testified that Jane Doe told him that John Doe had sexually assaulted her on three occasions, each time more violent and abusive, and that she screamed and tried to get away. According to Sweeney, Jane Doe also said that John Doe repeatedly threatened her life, and that she did not believe the university could protect her from him. [6]

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[6] Sweeney prepared a written declaration in which he stated that Jane Doe told him John Doe had "physically forced her, as well as verbally threatened her, to have both vaginal as well as anal intercourse." Clerk's Papers (CP) at 202. When questioned about the statement at trial, Sweeney testified that "[t]he 'anal' should have been 'oral' and I made a mistake in that." RP at 1389.

In January 1994, Jane Doe asked Janet Burcalow (Burcalow), chair of the department of teacher education, not to pursue the matter. But according to Burcalow, Jane Doe would not say that nothing happened, and Jane Doe admitted being afraid that John Doe would be angry if he found out she had talked about their relationship. Jane Doe testified that Burcalow told her that Burcalow already knew something bad had happened. Jane Doe told Burcalow these things were not true. Then Burcalow shook a finger at Jane Doe and asked her if she knew "where people who lie go." CP at 1886, 1925.

Cheryl Lepper, an instructor in the teacher education department, testified at trial that Jane Doe told her in the spring of 1993 that John Doe had forced Jane Doe to have sexual intercourse with him. According to Lepper, Jane Doe said John Doe had restrained her, forced her to have sex, and had then stalked her after she broke up with him.

In February 1994, Dr. Corrine McGuigan (McGuigan), dean of the school of education, met with League, Kyle, Burcalow, and Sweeney. McGuigan obtained written summaries of the narratives they presented to her, and later concluded that there was sufficient evidence of a serious behavioral problem to preclude her from signing the moral character affidavit supporting John Doe's application for teacher certification. [7]

John Doe first learned about Gonzaga's investigation of him on March 4, 1994, the same day he made his final payment of fees and tuition to Gonzaga. John Doe received a call asking him to come to McGuigan's office. He was escorted to a private room and left to read a letter from

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[7] McGuigan testified at trial that "it's easy for people's reputation to be slandered, specially in the case of a teacher if it is sexual misconduct that is alleged." RP at 1495.

McGuigan. The letter explained that in light of allegations of sexual assault, McGuigan would not give John Doe the moral character affidavit required to support his application for certification to teach. McGuigan refused to tell John Doe who had made the allegations against him. Testimony was also presented that when John Doe and his parents asked about their appeal rights, they were told there were none.

By the time of trial, Jane Doe had married and was attending graduate school in another state. Because she was unavailable, John Doe presented her testimony through portions of a 1997 videotaped deposition, which were shown to the jury. In both the videotaped deposition and a 1995 deposition, Jane Doe denied that John Doe had sexually assaulted her. She denied that she had made many of the statements that Gonzaga personnel attributed to her. She testified that Lynch had "really blown things out of proportion," and that there were falsehoods in the declarations of Kyle, Burcalow, and Sweeney. Report of Proceedings (RP) at 877. Jane Doe denied speaking about personal matters to Lepper. She testified that she had tried to dissuade Kyle and Burcalow from pursuing the allegations. Jane Doe felt that Burcalow "wasn't interested in hearing anything other than what she already believed." CP at 1887. Jane Doe told McGuigan that Gonzaga personnel were "wrong in their assumptions" about what had happened in her relationship with John Doe. *Id.* She testified that some of the things that happened in her sexual relationship with John Doe made her uncomfortable.

John Doe testified that he and Jane Doe had sexual intercourse on five occasions. He said he stopped when she seemed uncomfortable, and she never asked him to stop. John Doe presented the testimony of roommates that they never saw or heard any indication that Jane Doe was unwilling to engage in sexual intercourse. He presented the testimony of two former girl friends that John Doe never

pressured them to engage in sexual activity, never tried to talk them into sexual activity uncomfortable to them, and never criticized them for not engaging in sex. John Doe testified that he found "a lot of lies" when he read the declarations of League, Kyle, Burcalow, and Sweeney. RP at 449. The declarations made him disgusted and angry. John Doe said that Gonzaga destroyed his career in teaching, his goals, and his dreams.

PROCEDURAL HISTORY

In June 1994, John Doe brought an action against Jane Doe and Gonzaga. John Doe sued Jane Doe for falsely accusing him of sexual assault or rape; he sued Gonzaga for republishing the accusations "both between and among staff and faculty of Gonzaga and by reporting the same to the Office of the Superintendent of Public Instruction." CP at 13. John Doe sought to recover from Gonzaga for defamation, negligence, and breach of educational contract. He also brought a separate action against Lynch, League, and Kyle, individually, and the two actions were consolidated by stipulation.

Jane Doe cross-claimed against Gonzaga, alleging defamation and negligent investigation. She counterclaimed against John Doe for sexually assaulting her. John Doe and Jane Doe agreed to dismiss their claims against each other in September 1996.

Jane Doe later filed a notice of dismissal of her claims against Gonzaga, leaving only John Doe's claims against Gonzaga and its employees for trial. John Doe's amended complaint asserted claims for defamation, intrusion into his private affairs, and a 42 U.S.C. § 1983 claim for violation of 20 U.S.C. § 1232g(b) (FERPA) against all parties, and claims for negligence and breach of educational contract against Gonzaga.

Following a trial held in Spokane County Superior Court between March 17 and April 1, 1997, the jury returned a verdict in John Doe's favor, awarding him damages as follows:

Defamation	$ 500,000
Breach of Educational Contract	55,000
Negligence	50,000
Invasion of Privacy	100,000
Violation of "FERPA" Rights	150,000
Punitive Damages for FERPA Violation	300,000
TOTAL	$1,155,000

The trial court entered judgment on the verdict and also awarded John Doe attorney fees and costs under 42 U.S.C. § 1988.

Gonzaga appealed to the Court of Appeals, seeking review of the judgment and the trial court's rulings denying Gonzaga's posttrial motions and awarding attorney fees to the plaintiff. John Doe cross-appealed, seeking review of the trial court's order denying his motion for CR 26(g) sanctions. By order of the Court of Appeals, the matter was transferred from Division Three to Division One.

The Court of Appeals reversed the negligence, invasion of privacy, 42 U.S.C. § 1983, and breach of contract awards and remanded for a new trial on the defamation claim. The appellate court also held that the trial court abused its discretion in failing to impose CR 26(g) sanctions against Gonzaga for discovery abuse. The trial court was ordered "to impose an appropriate sanction on remand." *Doe v. Gonzaga Univ.*, 99 Wash. App. 338, 361, 992 P.2d 545 (2000).

This Court granted John Doe's petition for review of the Court of Appeals' decision. *Doe v. Gonzaga Univ.*, 141 Wash.2d 1023, 10 P.3d 1075 (2000).

ANALYSIS

Standard of Review

Questions of law are reviewed de novo. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wash.2d 337, 341, 883 P.2d 1383 (1994). Factual findings are reviewed under the substantial evidence standard: "The record must contain a sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the premise in question." *Canron, Inc. v. Fed. Ins. Co.*, 82 Wash. App. 480, 486, 918 P.2d 937 (1996).

An appellate court may overturn a jury's verdict only if the verdict is "clearly unsupported by substantial evidence." *Burnside v. Simpson Paper Co.*, 123 Wash.2d 93, 108, 864 P.2d 937 (1994). The court may not substitute its judgment for that of the jury when there is evidence that, if believed, would support the verdict rendered. *Id.*

A trial court's evidentiary rulings are upheld on appeal absent an abuse of discretion. *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wash. App. 368, 372, 901 P.2d 1079 (1995). Abuse of discretion is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

Issues [8]

In addition to certain evidentiary and procedural questions, the primary issues in this case may be stated as follows:

1. Whether Gonzaga or its employees may be held liable for defamatory statements made only among Gonzaga personnel.

2. Whether Gonzaga has a duty to exercise reasonable care in collecting information or investigating whether a candidate for certification as a teacher has a history of serious behavioral problems.

3. Whether a candidate for certification as a teacher waives his or her common law right to privacy.

4. Whether FERPA creates any right or privilege which can be enforced by individuals under 42 U.S.C. § 1983.

5. Whether statements in Gonzaga's bulletin and other publications agreeing to provide an opportunity for students to be heard in matters affecting their welfare constitute an enforceable contract with regard to Gonzaga's issuance of an affidavit for teacher certification.

1. Defamation

"In Washington, a defamation plaintiff must show four essential elements: falsity, an unprivileged communication, fault, and damages." *Commodore v. Univ. Mech.*

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[8] As a threshold matter, Gonzaga moves to strike John Doe's reply to Gonzaga's answer to the petition for review. A party may not reply to an answer unless the answer raises a new issue. RAP 13.4(d). In its answer, Gonzaga presented arguments as to why review should be denied. However, Gonzaga did not request that this Court address additional issues. Therefore, Gonzaga's motion to strike is granted.

Contractors, Inc., 120 Wash.2d 120, 133, 839 P.2d 314 (1992). Liability for defamation requires that the defamation be communicated to someone other than the person defamed; in other words, there must be a "publication" of the defamation. *Pate v. Tyee Motor Inn, Inc.*, 77 Wash.2d 819, 821, 467 P.2d 301 (1970). The Court of Appeals vacated John Doe's defamation award and directed that the jury be instructed on remand that Gonzaga cannot be held liable for communications among its own employees.

More than 80 years ago, this Court held that intracorporate communications are not "published" for purposes of defamation. "For a corporation ... acting through one of its agents or representatives, to send a libelous communication to another of its agents or representatives cannot be a publication of the libel on the part of the corporation. It is but communicating with itself." *Prins v. Holland-North Am. Mortgage Co.*, 107 Wash. 206, 208, 181 P. 680 (1919). The plaintiff there was a Seattle branch manager of a company headquartered in the Netherlands. The alleged defamation was contained in a letter sent by the main office and read only by the plaintiff's co-manager and a bookkeeper. The *Prins* court held that there had been no publication of the allegedly defamatory statements.

In the case before us, the Court of Appeals reasoned that, likewise, the conversations and memoranda between Gonzaga's employees regarding John Doe should be characterized as the university communicating with itself – not the kind of "publication" required to support a defamation claim.

John Doe contends that the common interests of a corporation's employees create only a qualified privilege. "A privileged communication involves the occasion where an otherwise slanderous statement is shared with a third person who has a common interest in the subject and is reasonably

entitled to know the information." *Pate*, 77 Wash.2d at 820-21, 467 P.2d 301. The plaintiffs in *Pate* were chambermaids who sued their employer and its supervisors for defamation. The alleged slander was a supervisor's statement that the plaintiffs were sneaking around joining a union – actions which amounted to Communism. The statement was made in a meeting attended by both the plaintiffs and nonunion housekeepers. The opinion noted that the supervisor had no duty to comment upon the ideology of unions in the ordinary course of her work, which took her statement outside the circumstances and principles of *Prins*.

Because the employees in *Prins* were clearly acting "within the limits of their employment," the court was not required to address the nature of any privilege on the communications among them. *Prins*, 107 Wash. at 208, 181 P. 680. However, when the supervisor in *Pate* made comments not "[i]n the ordinary course of her work," she could be held liable for publishing a defamatory statement to third persons, even though the third persons were also employees of the corporation. *Pate*, 77 Wash.2d at 821, 467 P.2d 301. Under these cases, intracorporate communications are not absolutely privileged. When a corporate employee, not acting in the ordinary course of his or her work, publishes a defamatory statement, either to another employee or to a nonemployee, there can be liability in tort for resulting damages.

In the instant case, from the evidence presented at trial, it could reasonably be found that Julia Lynch was not acting in the ordinary course of her work as an office assistant when she told another student that John Doe had injured Jane Doe during a sexual relationship. It could also be found that Roberta League was not acting in the ordinary course of her work as a certificate specialist when she eavesdropped on Lynch's conversation and shared her concerns of possible misconduct with Susan Kyle. Likewise, it could be found that Roberta League and Susan Kyle were not acting in the

ordinary course of their work when they questioned Lynch about alleged sexual assaults of Jane Doe by John Doe and then disclosed John Doe's identity and details about his sexual relations to Adelle Nore at OSPI.

The Court of Appeals reversed the trial court for refusing to give Gonzaga's proposed *Prins* jury instruction. However, the doctrine of *Prins* has been refined by *Pate*. The holding of *Prins* must be read in conjunction with the later holding of *Pate*. There is a qualified privilege for communications made between coemployees, but that privilege may be lost if the employees are not acting in the ordinary course of their work. The trial court's instructions fully encompassed the principles of publication and qualified privilege in a corporate context as announced in *Pate*. Therefore, the jury was properly instructed.

When a defendant has a qualified privilege to communicate a potentially defamatory statement, the privilege may also be lost by showing that the defendant made the statement with actual malice. *Caruso v. Local Union No. 690,* 107 Wash.2d 524, 530-31, 730 P.2d 1299 (1987). Actual malice exists when a statement is made "with knowledge of its falsity or with reckless disregard of its truth or falsity." *Herron v. KING Broad. Co.,* 109 Wash.2d 514, 523, 746 P.2d 295 (1987). "To prove actual malice a party must establish that the speaker knew the statement was false, or acted with a high degree of awareness of its probable falsity, or in fact entertained serious doubts as to the statement's truth." *Story v. Shelter Bay Co.,* 52 Wash. App. 334, 343, 760 P.2d 368 (1988).

The Court of Appeals held that the trial court's actual malice instruction was deficient because it failed to set forth the subjective nature of the reckless disregard standard. John Doe contends Gonzaga's own proposed instruction was deficient. Gonzaga's instruction reads as follows:

> "Actual malice" or "lack of good faith," when used in these instructions, means that the defendant knew that a statement was false or acted with reckless disregard as to whether a statement made was true or false. One acts with "reckless disregard for the truth or falsity of a statement" when one knows of the existence of information which would render a statement false and, nevertheless, without reasonable justification, disregards the information. The plaintiff has the burden of proving "actual malice" or "lack of good faith" by clear and convincing evidence.

CP at 1441.

The requested instruction sets forth the correct standard of proof clear and convincing evidence. However, it defines a knowingly false statement, not a statement made with recklessness. The case law cited by Gonzaga in support of its instruction tracks the language of the instruction given by the trial court. Gonzaga cannot be heard to complain.

Under Washington law, the trial court properly instructed the jury regarding the defamation claim. There was sufficient evidence for the jury to find that communications among Gonzaga personnel and statements made to OSPI were not privileged. Therefore, the jury's verdict and damage award for John Doe's defamation claim are reinstated.

2. Negligence

At trial, John Doe contended that when examining witnesses and investigating the details of his private life, Gonzaga owed a duty of care to conduct its investigation reasonably.

The language of former WAC 180-75-082 (1989), *repealed by* St. Reg. 97-04-088 (Mar. 8, 1997), the administrative regulation authorizing Gonzaga to collect information regarding a teacher certification candidate's potential behavioral problems, does not impose an affirmative duty on

the university to formally investigate a candidate's personal history.[9] In fact, the regulation requires only that a designated university official contact several faculty members who know or knew the applicant in order to ascertain whether they have any knowledge that the applicant has been convicted of a crime or has a history of any serious behavioral problems.

As noted by the Court of Appeals, no statute or administrative regulation applicable to this case imposed an affirmative duty on Gonzaga to investigate allegations of behavioral problems among its education students. Absent a duty to investigate, there can be no breach of duty. Although John Doe urged the courts below to imply a duty to act reasonably when Gonzaga voluntarily undertook to investigate, there is no basis to create such a duty.

Because Gonzaga had no duty to conduct an independent investigation, a claim of negligent investigation cannot be supported. The Court of Appeals properly reversed the judgment on John Doe's negligence claim, and the claim was not pursued before this Court.

3. Invasion of Privacy

"[T]he common law right of privacy exists in this state and ... individuals may bring a cause of action for invasion of that right." *Reid v. Pierce County*, 136 Wash.2d 195, 206, 961 P.2d 333 (1998).

The jury was properly instructed, based on *Restatement (Second) of Torts* § 652B (1977), concerning John Doe's claim –

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[9] At the time of the events in question, WAC 180-75 (1989) detailed the application process for teacher certification. The chapter was repealed in 1997 and was reenacted as a part of WAC 180-79A and 180-86.

With respect to plaintiff's claim for "invasion of privacy," the plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

1. An intentional intrusion, physically or otherwise, upon the solitude or seclusion of plaintiff, or his private affairs;

2. With respect to the matter or affair which plaintiff claims was invaded, that plaintiff had a legitimate and reasonable expectation of privacy;

3. The intrusion would be highly offensive to a reasonable person; and

4. That the defendant's conduct was a proximate cause of damage to plaintiff.

CP at 1478.

Gonzaga asserts that there was nothing "highly offensive" about its attempts to determine the facts about John Doe's relationship with Jane Doe. However, the jury heard testimony that Gonzaga personnel had inquired into the personal relationships, habits, and even anatomy of John Doe. Although state regulation authorizes officials from a teacher certificate applicant's school to contact faculty members regarding the applicant's history of serious behavioral problems, the provision does not contemplate an investigation by nonfaculty school personnel into the intimate details of a candidate's sex life:

> "Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters.... When these intimate details of his life are spread before the public gaze in a manner highly offensive to the

ordinary reasonable man, there is an actionable invasion of his privacy...."

Cowles Publ'g. Co. v. State Patrol, 109 Wash.2d 712, 721, 748 P.2d 597 (1988) (quoting *Restatement (Second) of Torts* § 652D, at 386 (1977)).

The jury was presented with sufficient evidence of Gonzaga's investigative activities to determine that John Doe's privacy had been invaded and that such an intrusion would be highly offensive to a reasonable person. The facts support John Doe's claim for invasion of privacy. The jury's verdict and damage award for this claim are reinstated.

4. FERPA

John Doe asserted Gonzaga's violation of his rights FERPA as the basis for his claims for damages under the Federal Civil Rights Act (42 U.S.C. § 1983). John Doe argues that Gonzaga violated FERPA by disclosing confidential information about him to OSPI.

The FERPA statute provides in pertinent part as follows:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents....[10]

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[10] The statute defines "education records" as "those records, files, documents, and other materials which ... contain information directly related to a student; and ... are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A).

When a student has reached 18 years of age, or is attending an institution of post-secondary education, required consent and

Gonzaga's alleged violation of FERPA rights grew out of a disclosure practice developed by Gonzaga personnel and OSPI. The jury heard testimony that Gonzaga personnel routinely called OSPI, before a student's application for certification was submitted, to talk about students as to whom they had "cause for concern" and to obtain advice. Nore testified that the calls about John Doe that OSPI received from League and others were typical of conversations she had with Gonzaga personnel. In preapplication conversations, Nore would often be told the names of the student candidates. Substantial evidence supports a determination that Gonzaga had a "policy or practice" of disclosing personally identifiable information contained in education records – in violation of FERPA.

Courts have held that FERPA itself does not give rise to a private cause of action. *E.g., Fay v. S. Colonie Cent. Sch. Dist.,* 802 F.2d 21, 33 (2d Cir. 1986). However, John Doe does not allege a private cause of action under FERPA. Instead, he asserts the FERPA violation as the basis for a claim under section 1983, which provides a remedy for violation of federally conferred rights. *Wilder v. Va. Hosp. Ass'n,* 496 U.S. 498, 509, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990).

The Supreme Court has provided guidance on the ability of a claimant to bring a section 1983 claim premised on the violation of a federal statute. To determine whether a particular statutory provision gives rise to a federal right, a court must examine the following three factors: (1) whether Congress intended the provision in question to benefit the plaintiff; (2) whether the right protected by the statute is so "vague and amorphous" that its enforcement would strain judicial competence; and (3) whether the statute imposes a

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rights accorded to the student's parents are to be accorded to the student. 20 U.S.C. § 1232g(d). 20 U.S.C. § 1232g(b)(1).

binding obligation on the states. *Blessing v. Freestone*, 520 U.S. 329, 329-30, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997).

Applying this three-factor test favors the conclusion that the FERPA provision at issue here gives rise to a federal right enforceable under section 1983.

First, the statute is intended to benefit students. The joint statement in explanation of FERPA states:

> The purpose of the Act is two-fold – to assure parents of students, and students themselves if they are over the age of 18 or attending an institution o[f] post-secondary education, access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent.

120 Cong. Rec. 39,862 (1974).

Second, the right is not so "vague and amorphous" that the court cannot enforce it. Courts routinely review the policies and practices of entities and individuals for statutory compliance.

Finally, the FERPA provision provides a binding obligation. If an educational institution does not require student consent before it releases educational records, "[n]o funds shall be made available under any applicable [federal educational] program." 20 U.S.C. § 1232g(b)(1).

The Court of Appeals relied on United States Supreme Court decisions regarding other federal statutes for guidance as to whether FERPA creates an enforceable individual right. [11] Reasoning by analogy from these cases, the Court of

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[11] The cases include *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987) (Brooke Amendment); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990) (Boren Amendment);

Appeals held that Gonzaga is not liable because "FERPA does not create individual rights privately enforceable under 42 U.S.C. § 1983." *Doe v. Gonzaga Univ.*, 99 Wash. App. at 357, 992 P.2d 545. However, the Supreme Court has not ruled on FERPA, the law at issue in this case.

Federal appellate decisions which have specifically addressed FERPA have held that the statute creates rights actionable under section 1983. [12] These well-reasoned decisions, which are directly applicable to the instant case, are more persuasive than those relied upon by the Court of Appeals. In the instant case, FERPA does create individual rights privately enforceable under section 1983.

In order to prevail on a section 1983 claim, "(1) the plaintiff must show that some person deprived ... [him or her] of a federal constitutional or statutory right; and (2) that person must have been acting under color of state law." *Sintra, Inc. v. City of Seattle*, 119 Wash.2d 1, 11, 829 P.2d 765 (1992). As discussed above, the statutory right at issue arises under FERPA.

Section 1983 itself provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to

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Suter v. Artist M., 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992) (Adoption Assistance and Child Welfare Act of 1980); and *Blessing v. Freestone*, 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997) (Title IV-D of the Social Security Act).

[12] *Falvo v. Owasso Indep. Sch. Dist. No. I 011*, 233 F.3d 1203 (10th Cir. 2000); *Brown v. City of Oneonta Police Dep't*, 106 F.3d 1125 (2d Cir. 1997); *Lewin v. Med. Coll. of Hampton Roads*, 931 F.Supp. 443 (E.D. Va. 1996), *aff'd*, 131 F.3d 135 (4th Cir. 1997); *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990); *Tarka v. Franklin*, 891 F.2d 102 (5th Cir. 1989).

> the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

Gonzaga argues that there was no substantial evidence that it was acting under color of state law. However, at trial, Janet Burcalow, who served for several years as the dean's designee, testified that Gonzaga acts for the State when it completes the moral affidavit for a student. Burcalow confirmed that she viewed the "Gonzaga certificate department as helping OSPI fulfill a duty that had been given to them by the legislature." RP at 829. When asked if there is a common interest between Gonzaga and OSPI, Burcalow responded, "Well, we work together on the matter of certification." RP at 861. Roberta League, Gonzaga's certification specialist, confirmed that Gonzaga is an agent of the State in the certification process. League testified about "my job in compliance with what I was supposed to do for the State of Washington for certification." RP at 759.

Whether the defendants were acting under color of state law is an issue of fact for the jury. Where there is joint action of the sort described at trial, the jury had substantial evidence to find that action under color of state law is present. *See Kuehn v. Renton Sch. Dist. No. 403,* 103 Wash.2d 594, 602, 694 P.2d 1078 (1985) (" 'It is enough that [a private person] is a willful participant in joint action with the State or its agents.' " (alteration in original) (quoting *Dennis v. Sparks,* 449 U.S. 24, 27, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980))).

As an alternative justification for its reversal of the jury's verdict on John Doe's FERPA claim, the Court of Appeals acted sua sponte in holding that "even if FERPA did create individual rights enforceable under § 1983, we would nonetheless hold that a teacher candidate *waives those rights*

when he or she applies for teacher certification." *Doe v. Gonzaga Univ.,* 99 Wash. App. at 357, 992 P.2d 545 (emphasis added). The Court of Appeals offers no statute, case law, or public policy in support of its holding.

Waiver is the intentional and voluntary relinquishment of a known right; it may be either express or implied. *Jones v. Best,* 134 Wash.2d 232, 241, 950 P.2d 1 (1998). To constitute implied waiver, there must be unequivocal acts or conduct evidencing an intent to waive; intent will not be inferred from doubtful or ambiguous factors. *Wagner v. Wagner,* 95 Wash.2d 94, 102, 621 P.2d 1279 (1980). Under the facts of this case, no such waiver by John Doe is demonstrated. In addition, John Doe's application for teacher certification had not been submitted to OSPI when personally identifiable information about his alleged sexual misconduct was communicated by Gonzaga. The Court of Appeals' holding that teacher candidates waive their FERPA rights enforceable under section 1983 when applying for certification cannot be supported.

At trial, evidence was presented to show that personally identifiable allegations of sexual misconduct were communicated to OSPI by Gonzaga. The allegations became part of the public record. The jury was properly instructed, and substantial evidence supported its unanimous award of punitive damages to John Doe. We reinstate the jury's verdict and damage awards for John Doe's FERPA claim.

5. Breach of Contract

Gonzaga argues that John Doe never articulated a coherent breach of contract theory. However, at trial, Gonzaga's student handbook was introduced. Under the heading "Mutual Responsibility," the handbook states as follows:

> The admission of a student to Gonzaga University and the student's acceptance of that admission constitute an

agreement of mutual responsibility. The student's obligation is to accept the published policies of the University and to act in a manner consistent with these policies. In turn, the University's responsibility is to provide an environment in which the student's educational goals may be achieved. The University also recognizes its obligation to provide students with an opportunity to be heard in matters affecting their welfare.

RP at 335-36.

The jury received the following proper instruction concerning the breach of contract claim:

> The relationship between a student and a university is primarily contractual in nature. Since a formal contract is rarely prepared, the general nature and terms of the agreement are usually implied. Specific terms can be found in the university bulletin and other publications.
>
> Implied contracts arise by inference or implication in some act or conduct. You may find implied contract by inference or implication from circumstances which, according to the ordinary course of dealing and people's common understanding, shows a mutual intention on the part of the parties to contract with each other.
>
> The interpretation of the terms of the contract that existed between Gonzaga and [John Doe] is for you to determine, from the university bulletin and other publications and from all of the facts and circumstances.

CP at 1471.

The jury was presented with Gonzaga's written representations concerning its agreement with its students and heard extensive testimony about the conduct of Gonzaga personnel toward John Doe. John Doe argued that Gonzaga breached its agreement by failing to discuss the sexual assault

allegations with him before reaching a final decision not to issue him an affidavit. John Doe testified that his long-term educational goal was to become a teacher. Sufficient evidence was presented for the jury to determine the existence, terms, and breach of a contract between Gonzaga and John Doe. The jury's verdict and damage award for John Doe's breach of contract claim are reinstated.

6. Evidentiary Issues

The trial court did not abuse its discretion in admitting four documents prepared by Gonzaga employees in anticipation of litigation or in refusing to admit the settlement agreement between John Doe and Jane Doe and the testimony of two witnesses disclosed by Gonzaga late in the trial.

7. Duplication of Damages

Gonzaga argues that the trial court judgment was excessive because the damages awarded by the jury on John Doe's claims overlap and are duplicative. The verdict form is actually structured so that the jury was required to consider each of the distinct claims for damages and to make individual determinations as to each defendant for each claim. In addition, the jury was instructed as follows:

> In this case plaintiff makes five separate claims for damages. Previously in these instructions the court has instructed you as to the elements of each claim and the burden of proof applicable to each claim. If you find that Plaintiff has not met his burden of proof on a claim then you need not and should not consider the issue of damages with respect to that claim.
>
> If, on the other hand, you find that Plaintiff has sustained his burden of proof with respect to a claim, then you should award any damage proved with respect to that claim.

CP at 1495.

Nothing in the verdict form or the jury instruction supports the argument that damages awarded on John Doe's claims overlap or are duplicative. In addition, when the verdict was entered, Gonzaga made no request for its clarification.

8. Discovery Sanctions

After document discovery and a series of depositions of Gonzaga employees in 1994, John Doe prepared a chronology of meetings and communications among Gonzaga personnel based on that discovery. He asked Gonzaga, by interrogatory, to review the document, to identify any inaccuracies, and to provide the dates and participants for any relevant meetings and communications not listed in the chronology.

Gonzaga objected to the interrogatory, asserting it was unduly burdensome and oppressive. Gonzaga answered by referring John Doe to depositions and to documents and answers to interrogatories already supplied by Gonzaga to him. Gonzaga also stated as follows: "All of the information supplied, in the aggregate, will support the accuracy or the inaccuracy of the 'chronology.' " CP at 1320. By this statement, Gonzaga implied that all responsive information was contained in material already produced.

About six weeks before the 1997 trial, through an independent motion, Gonzaga was ordered to produce documents earlier withheld on the basis of the attorney-client privilege or as attorney work product. In particular, John Doe obtained a chronology prepared in 1994 by Gonzaga personnel. John Doe claims the chronology contained references to meetings and conversations that Gonzaga had not previously disclosed, requiring John Doe to re-depose two witnesses.

John Doe filed a CR 26(g) motion for sanctions. The trial court found that he suffered no ultimate harm because the

document was eventually produced; therefore, the motion for sanctions was denied.

Civil Rule 26(g) requires an attorney to respond to a discovery request after making "reasonable inquiry," and to certify that the response is: (1) consistent with the rules, (2) not interposed for any improper purpose, and (3) not unreasonable or unduly burdensome or expensive. This Court has held that if a certification is made in violation of the rule, sanctions are mandated. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 355, 858 P.2d 1054 (1993).

In the case before us, the record reflects that Gonzaga responded to John Doe's interrogatory without making reasonable inquiry. It was unreasonable for Gonzaga's counsel not to ask his clients if Gonzaga personnel had, in fact, prepared a chronology of events. Gonzaga's representation that it would be unduly burdensome or unreasonable to provide a chronology was misleading in that it served to deflect a motion to compel a response to the interrogatory. Gonzaga's response was inconsistent with the spirit and intent of the rules. For these reasons, the Court of Appeals properly found that the trial court abused its discretion in failing to impose CR 26(g) sanctions against Gonzaga.

We affirm the Court of Appeals' order that the trial court impose an appropriate sanction against Gonzaga for violation of CR 26(g) on remand.

CONCLUSION

The Court of Appeals' decision is reversed and the judgment is reinstated on the jury verdict as to John Doe's claims for defamation, invasion of privacy, violation of his rights under FERPA, and breach of contract.

The Court of Appeals' rulings dismissing John Doe's negligence claim and remanding to the trial court for imposition of an appropriate sanction against Gonzaga for violation of CR 26(g) are affirmed.

The trial court's supplemental judgment for attorney fees and costs is reinstated, and John Doe is awarded reasonable attorney fees and expenses on appeal pursuant to RAP 18.1.

ALEXANDER, C.J., SMITH, JOHNSON, SANDERS, BRIDGE, CHAMBERS and OWENS, JJ., and BROWN, J.P.T., concur.

APPENDIX B

THE SUPREME COURT OF WASHINGTON,

JOHN DOE,

Petitioner,

v.

GONZAGA UNIVERSITY, a Washington nonprofit corporation, JULIA M. LYNCH, ROBERTA S. LEAGUE, and SUSAN J. KYLE,

Respondents.

No. 69456-7

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having considered Gonzaga's Motion for Reconsideration;

Now, therefore, it is hereby

ORDERED:

That Gonzaga's Motion for Reconsideration is denied.

DATED at Olympia, Washington this 10th day of August 2001.

Gerry L. Alexander
Chief Justice

APPENDIX C

COURT OF APPEALS OF WASHINGTON,

Division 1.

JOHN DOE,

Respondent/Cross-Appellant,

v.

GONZAGA UNIVERSITY, a Washington nonprofit corporation, JULIA M. LYNCH, ROBERTA S. LEAGUE, and SUSAN J. KYLE,

Appellants/Cross-Respondents.

No. 43437-3-I

Jan. 31, 2000

APPELWICK, J.

John Doe, a former student in Gonzaga University's department of education, sued Gonzaga and three of its staff members for spreading allegations that Doe had sexually assaulted another student, and for refusing to submit a moral character affidavit supporting Doe's application for teacher certification. The primary issues before us on appeal are whether any of the defendants can be liable for allegedly defamatory statements that Gonzaga employees made only to one another, and whether Gonzaga was entitled to judgment as a matter of law on Doe's claims for negligence, breach of educational contract, invasion of privacy, and violation of 42 U.S.C. § 1983. Holding in favor of Gonzaga on these issues, we reverse and remand for a new trial on the defamation claim only. We also reverse certain of the trial court's discovery and evidentiary rulings.

FACTS

On October 5, 1993, Roberta League, the certificate specialist in Gonzaga's school of education, overheard Gonzaga student Julia Lynch telling a friend the following:

> [W]hen I was an RA, my resident, [Jane Doe], was in obvious physical pain. She couldn't eat, she couldn't sleep, and she was having blood in her urine, stomach cramps, she said it was a result of having sex with [John Doe], this man she has been seeing, and no one from the school bothered to ask her any questions or find out what really happened. They had a little bit of information that she was hurt and tucked it away.

The conversation concerned League because John Doe, a student in the school of education, was at that time student teaching. Soon afterward, League discussed the matter with Dr. Susan Kyle, the director of field experience for student teachers at Gonzaga.

Kyle and League decided that they needed to investigate the situation further. They were concerned that the allegations League had overheard about John Doe might affect the dean's ability to submit an affidavit supporting Doe's application for teacher certification. Pursuant to RCW 28A.410.010, the Washington State Board of Education has promulgated rules governing the teacher certification process.

See WAC 180-77, 180-78, 180-86, 180-87, and former 180-75. The rules require a designated official from a certification applicant's school to contact several members of the faculty who know or knew the applicant. The dean must then swear that he or she and the faculty members consulted have "no knowledge that the applicant has been convicted of any crime and [have] no knowledge that the applicant has a history of any serious behavioral problems." WAC 180-75-082(3). [1]

On October 14, 1993, Kyle and League met with Lynch. According to written declarations that Kyle and League drafted in February 1994, which were admitted at trial, Lynch told them that Jane Doe had admitted to her that John Doe had sexually assaulted her three times, in late November or December, 1992. Lynch said further that Jane Doe had claimed that John Doe verbally coerced her into participating in 'aberrant sexual behavior' with 'other objects besides his penis,' and had urged her to engage in multiple partner sex. Lynch told League and Kyle that she had accompanied Jane Doe to the health center soon after the sexual assaults, and that the nurse had concluded that Jane Doe was date raped. At trial, however, Lynch testified that the behaviors Jane Doe had described to her were in fact normal, non-aberrant sexual activities, and that she did not remember telling League and Kyle about foreign objects. Lynch further testified that she did not remember whether Jane Doe had told her that John Doe said he wanted to sleep with more than one person at a time, only that she told her that he wanted to sleep with both Jane Doe and another girlfriend of his. League admitted at

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[1] WAC 180-75-082 was repealed, effective March 8, 1997. It was replaced by WAC 180-79A-155, which similarly requires a teacher candidate to submit a moral character affidavit from the school of education in support of the application for certification. The change in the law does not affect the outcome in this case.

trial that Lynch told her in the October 1993 meeting that Jane Doe had denied the rape allegations when Lynch spoke to Jane Doe in December 1992.

At the meeting with Kyle and League, Lynch agreed to approach Jane Doe. When she did, Jane Doe became angry and told Lynch that she did not want to pursue a rape charge.

Soon after conferring with Kyle, League telephoned Adelle Nore, a senior investigator with the Office of the Superintendent of Public Instruction (OSPI), which regulates teacher education programs. All together, Gonzaga personnel contacted Nore on at least six occasions in relation to the allegations against John Doe. During this initial conversation, League told Nore that a teacher education student had possibly date raped another student. League identified John Doe by name in a subsequent telephone call. Nore advised League to "talk to the girl who made the date rape charge in person." In her notes, Nore recorded that League had informed her that the "girl" was willing to come forward. Nore testified that her consistent understanding in her conversations with League and Kyle, was that the victim was credible and prepared to make a statement.

On October 28, 1993, Kyle met with Jane Doe, and told her about the date rape allegations. According to Kyle, Jane Doe would not comment on the relationship, and stated, "I guess I don't really know what rape is," and, "I promised [John Doe] I wouldn't tell. He made me promise." Jane Doe refused to make a formal statement.

Immediately after leaving Kyle's office, Jane Doe met with Professor William Sweeney. According to Sweeney, Jane Doe was "near hysteria" and weeping uncontrollably. Sweeney testified that Jane Doe told him during the meeting that John Doe had sexually assaulted her on three occasions, each time more and more violent and abusive, and that she had screamed and tried to get away. According to Sweeney,

Jane Doe also said that John Doe repeatedly threatened her life, and that she did not believe the university could protect her from him.

On January 26, 1994, Jane Doe met with Janet Burcalow, chair of the department of teacher education. Jane Doe tried to persuade Burcalow not to pursue the matter. But according to Burcalow, Jane Doe refused to say that nothing serious had happened in the relationship, and admitted being afraid of what might happen if John Doe found out she had talked about their relationship.

Cheryl Lepper, an instructor in the teacher education department, testified that Jane Doe had told her about the sexual assaults in the spring of 1993. According to Lepper, Jane Doe said that John Doe had restrained her and forced her to have sex, and had then stalked her after she broke up with him.

Some time in February 1994, Dr. Corrine McGuigan, the dean of the school of education, met with Kyle, Burcalow, League, and Sweeney. The dean concluded after the meeting that sufficient evidence of a serious behavioral problem precluded her from signing the affidavit supporting John Doe's application for teacher certification.

John Doe did not hear about Gonzaga's investigation into the date rape allegations until March 4, 1994. On that date, Doe was called into Dean McGuigan's office, where he was escorted to a private room, and left to read a letter that the dean had signed. The letter informed Doe that the dean would not give him the moral character affidavit required to support his application for certification to teach, due to the sexual assault allegations. Doe was not told who had made the allegations.

John Doe sued Jane Doe for defamation, and Gonzaga for defamation, negligence, breach of educational contract, and

violation of 42 U.S.C. § 1983 for releasing his name to OSPI in violation of the Family Educational Rights and Privacy Act (FERPA). Two years later, John Doe sued Lynch, League and Kyle separately. The two actions were consolidated.

Jane Doe counter-claimed against John Doe for sexual assault. John Doe and Jane Doe settled their lawsuit in 1996, dismissing their claims against each other.

A jury trial was held between March 17 and April 1, 1997 on the remaining claims. In response to pretrial and trial motions, the trial court made several rulings that are at issue in this appeal. The court admitted several documents that Gonzaga personnel had prepared at the request of corporate counsel, over Gonzaga's objections that the documents were protected by attorney-client privilege. The court refused to admit the settlement agreement between John Doe and Jane Doe. The court also refused to admit the testimony of two witnesses who came forward after trial had begun; both witnesses would have testified that Jane Doe had told them that she had been sexually assaulted by a boyfriend. Gonzaga offered the evidence not to prove the truth of the allegation, but to impeach Jane Doe's testimony that she had not used the terms 'rape' or 'date rape.'

By the time of trial, Jane Doe had moved to North Carolina and was unwilling to attend. Instead, John Doe presented Jane Doe's testimony through a 1997 videotaped deposition, portions of which were shown to the jury. In both the videotaped testimony and an earlier 1995 deposition, Jane Doe essentially denied both that John Doe had sexually assaulted her, and that she had made most of the statements that Gonzaga personnel attributed to her. Specifically, in her videotaped testimony, Jane Doe testified that Lynch had "really blown things out of proportion," and that there were "wild things" and other falsehoods in Kyle's, Sweeney's, and Burcalow's testimonies. She denied speaking to Cheryl

Lepper, using the word "rape," or being afraid for her life. Jane Doe testified that she had tried to dissuade Kyle and Burcalow from pursuing the allegations, but that the two women were "trying to get me to agree that this had happened," and were uninterested in hearing anything other than what they already believed. Jane Doe admitted, however, that some things had happened in her relationship with John Doe which had made her uncomfortable.

The jury returned a verdict for John Doe on all five theories of recovery. The jury awarded damages in the following amounts:

Defamation	$ 500,000
Invasion of Privacy	100,000
Violation of "FERPA" Rights	150,000
Punitive Damages for FERPA Violation	300,000
Breach of educational contract	55,000
Negligence	5[illegible],000
TOTAL	$1,155,000

The jury was not instructed to segregate the damages, and did not specify which of Gonzaga's wrongful behaviors gave rise to which damages. Gonzaga now appeals.

DEFAMATION

A. *Prins* Instruction

The first issue before us is whether the trial court properly instructed the jury regarding the defamation claim. Gonzaga asked the court to instruct the jury that neither Gonzaga nor the individual defendants could be liable for communications

made only among Gonzaga personnel. The court rejected the instruction. We hold that the court's decision was in error.

Jury instructions are sufficient if they permit each party to argue his or her theory of the case, are not misleading, and when read as a whole, properly inform the trier of fact of the applicable law. *State v. Rice,* 110 Wash.2d 577, 603, 757 P.2d 889 (1988).

Communications made only among corporate personnel are not published for the purposes of defamation. *Prins v. Holland-North America Mortgage Co.,* 107 Wash. 206, 208, 181 P. 680 (1919). In *Prins,* the Court held that a letter from one officer of a corporation to another did not constitute publication because a corporation acting through its agents and employees "is but communicating with itself." 107 Wash. at 208, 181 P. 680.

Consistent with the *Prins* rule, Gonzaga University could not be liable for any defamatory communications made only among its employees. Here, the rule shields the individual defendants as well; after all, the corporation can speak to itself only through the individuals who work for it. Therefore, the trial court erred in rejecting Gonzaga's proposed *Prins* instruction.

Moreover, the court's error was not harmless. Testimony at trial focused primarily on the communications that Gonzaga personnel made only among themselves. The only allegedly defamatory statements that fall outside the *Prins* exception are those made to Adelle Nore at OSPI. Because the error was not harmless, we reverse the defamation award and remand for a new trial on that claim. On remand, the trial court is instructed to give the jury a *Prins* instruction.

B. Actual Malice Instruction

Gonzaga also contests the trial court's defamation jury instructions on the ground that they misstate the standard for

determining whether the communications at issue were protected by a qualified privilege. John Doe responds that the error was not properly preserved because Gonzaga's proposed instruction was deficient.

A claim that the trial court has applied an incorrect standard of proof under the First Amendment may be considered for the first time on appeal, because it is an issue affecting fundamental constitutional rights. *Richmond v. Thompson,* 130 Wash.2d 368, 385, 922 P.2d 1343 (1996). Therefore, even if Gonzaga's proposed instruction was deficient, it may raise the issue for the first time on appeal.

Here, Gonzaga had a qualified privilege to make the allegedly defamatory statements at issue. The WAC provision governing Gonzaga's role in the teacher certification process, gives Gonzaga a qualified privilege to contact several members of the faculty and staff about an applicant's potential behavioral problems. *See* WAC 180-79A-122(3). This same provision also implicitly grants Gonzaga a qualified privilege to seek guidance from OSPI regarding the certification process. If not for this qualified privilege, schools like Gonzaga would be discouraged from investigating claims of a future teacher's potential behavioral problems. The ultimate purpose of the qualified privilege is to protect school children.

When a defendant like Gonzaga has a qualified privilege to communicate potentially defamatory statements, the privilege may be lost by showing that the defendant made the statements with actual malice. *Parry v. George H. Brown & Assocs., Inc.,* 46 Wash. App. 193, 197, 730 P.2d 95 (1986); *Story v. Shelter Bay Co.,* 52 Wash. App. 334, 342, 760 P.2d 368 (1988). Actual malice exists when a statement is made with knowledge of its falsity or with reckless disregard of whether it was false or not. *Richmond v. Thompson,* 130 Wash.2d 368, 376, 922 P.2d 1343 (1996). "[R]eckless

disregard" is a subjective standard, and requires the plaintiff to prove that the speaker "acted with a high degree of awareness of [the statement's] probable falsity, or in fact entertained serious doubts as to [its] truth." *Story,* 52 Wash. App. at 343, 760 P.2d 368. A plaintiff cannot show actual malice by merely showing that a defendant unreasonably failed to investigate the truth of a statement. *See Parry v. George H. Brown & Assocs., Inc.,* 46 Wash. App. 193, 197, 730 P.2d 95 (1986). But when a speaker does in fact conduct an investigation and the investigation does not support the false statement or brings to the speaker's attention facts that rebut the false statement, that is evidence from which a jury can infer reckless disregard. *Herron v. KING Broadcasting Co.,* 112 Wash.2d 762, 776 P.2d 98 (1989).

Here, the court correctly instructed the jury that the statements at issue were protected by a qualified privilege, and that John Doe had to prove by clear and convincing evidence that Gonzaga had made the statements with actual malice. The jury was further instructed that, "abuse of privilege occurs if the maker of the allegedly false and defamatory statement knew, at the time the statement was made, that the statement was false, or acted with reckless disregard as to the truth or falsity of the statement." But the court did not define "reckless disregard" for the jury. Gonzaga argues that the court's instruction is deficient because it failed to make clear to the jury that "reckless disregard" is a subjective standard. Gonzaga contends that the jury could have incorrectly inferred that an unreasonable failure to investigate the truth of the date rape allegations was evidence of recklessness.

Gonzaga's argument is well taken. On remand, the court is directed to instruct the jury regarding the subjective nature of the "reckless disregard" standard.

SECONDARY CLAIMS

Gonzaga next argues that the trial court erred in failing to grant it a directed verdict on the remaining claims of negligence, invasion of privacy, violation of 42 U.S.C. § 1983, and breach of educational contract. In reviewing a trial court's decision to deny a motion for directed verdict, we apply the same standard as the trial court. A directed verdict is appropriate if, when viewing the material evidence most favorable to the nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party. *Industrial Indem. Co. of the Northwest v. Kallevig,* 114 Wash.2d 907, 915-16, 792 P.2d 520 (1990).

A. Negligence

Gonzaga asserts it is immune from liability for negligent reporting about John Doe, pursuant to RCW 4.24.510. We agree with John Doe, that this claim is an affirmative defense which may not be raised for the first time on appeal. We do not decide that the defense does or does not have application to these facts.

Gonzaga next argues that it cannot be liable for negligence in this case because it had no duty to John Doe to exercise reasonable care in collecting information regarding his potential behavioral problems. John Doe responds that we should create or extend such a duty. There are no cases interpreting the WAC provision that governs Gonzaga's role in the teacher certification process, to guide us in addressing this issue.

The WAC provision authorizing Gonzaga to collect information regarding a teacher certification candidate's potential behavioral problems does not expressly impose a duty on the university to investigate formally any unfavorable allegations that arise. *See* WAC 180-75-082. To the contrary, WAC 180-75-082 requires only that a designated official of an applicant's school contact several faculty

members who know or knew the applicant. Only if both the school official and the faculty members consulted have "no knowledge that the applicant has a history of any serious behavioral problems" may the dean sign an affidavit under penalty of perjury supporting the candidate's application. WAC 180-75-082.

In arguing that Gonzaga owed him a duty to investigate, John Doe analogizes the present case to several cases that address Department of Social and Health Services (DSHS) caseworkers' duties in reporting child abuse allegations. In those cases, Washington courts held that caseworkers have a duty to exercise reasonable care when investigating child abuse allegations. But the caseworker cases are distinguishable because a statute and administrative regulations impose a duty to investigate on caseworkers. *See Lesley v. Department of Soc. and Health Servs.,* 83 Wash. App. 263, 273, 921 P.2d 1066 (1996) ("[A] specific statute provides that DSHS caseworkers have a duty to investigate. RCW 26.44.050. A cause of action for negligent investigation thus exists against DSHS caseworkers."); *Yonker v. Department of Soc. and Health Servs.,* 85 Wash. App. 71, 81-82, 930 P.2d 958 (1997) (RCW 26.44.050 imposed duty to investigate reports of possible occurrence of child abuse); *Dunning v. Pacerelli,* 63 Wash. App. 232, 239, 818 P.2d 34 (1991) (DSHS caseworkers potentially liable for negligent investigation into allegations of child abuse).

In the alternative, John Doe contends that Gonzaga did undertake an investigation in this case, and that once it began the investigation, it owed a duty to Doe not to be negligent. But the cases that Doe cites in support of this argument are not on point. In those cases, the courts held that a person who chooses to assist another, even gratuitously, inducing reliance on that assistance, may be liable for failure to exercise reasonable care. *See Alston v. Blythe,* 88 Wash. App. 26, 943 P.2d 692 (1997); *Roth v. Kay,* 35 Wash. App. 1,

664 P.2d 1299 (1983); *Sheridan v. Aetna Cas. & Sur. Co.*, 3 Wash.2d 423, 100 P.2d 1024 (1940). These principles are inapplicable here because Gonzaga did not undertake to render aid or warn John Doe.

WAC 180-75-082 requires the applicant for certification to submit an affidavit about the applicant's criminal history, serious behavioral problems and past teaching history. The applicant must also submit an affidavit of good moral character and personal fitness from the designated official at the school of education. The regulation provides that the applicant must submit a statement, as opposed to an affidavit, if it is not possible for the school official to execute an affidavit with the required content. In that statement, the applicant must explain why it is impossible or impractical to obtain the affidavit. In all respects the only duty imposed is on the applicant.

The affidavit from the school of education contemplates signature under penalty of perjury. The school official must attest to contacting "several faculty" who know or knew the applicant. The regulation does not require contacting all faculty who know or knew the applicant, nor those who know or knew the applicant best, nor even anyone who knew the applicant most recently. The scope of the effort is up to the school.

The affidavit, if filed, must indicate that the affiant and the several faculty contacted have no knowledge that the applicant has not been "convicted of any crime," nor that the applicant has "a history of any serious behavioral problems." The regulation provides no further definition of "crime," "serious behavioral problems" or "knowledge." The answers from the faculty may be wholly subjective as a result. Any consulted faculty member's belief, based on rumor or personal observation that an applicant had a serious

behavioral problem, is enough to prevent the execution of the school's affidavit.

Clearly, this regulation does not contemplate the kind of investigation undertaken by child protective services.

Schools of education have a vested interest in seeing their graduates certificated. The inability or unwillingness of the school to provide the affidavit is evidence of concerns that overcome this vested interest. These concerns about criminal conduct and serious behavioral problems are issues that OSPI should hear about and should investigate. It is in the interest of school children and the public to have such reporting by the schools of education and investigation by OSPI.

We find no basis for the creation of a new duty on the part of the school of education to conduct an independent investigation. That is a legislative prerogative that we will not exercise. The judgment on the negligence claim is therefore reversed.

B. Invasion of Privacy

Gonzaga next argues that it is entitled to judgment as a matter of law on the invasion of privacy claim. We hold that the facts here do not support a claim for invasion of privacy.

John Doe's invasion of privacy claim is based on *Restatement (2d) of Torts* § 652B (1977): "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." The common law right to privacy exists in Washington, and individuals may bring a cause of action for invasion of that right. *Reid v. Pierce County*, 136 Wash.2d 195, 206, 961 P.2d 333 (1998).

The evidence here is insufficient to support a claim for invasion of privacy. Again, WAC 180-75-082 authorizes officials from a teacher certificate applicant's school to contact several faculty members regarding the candidate's potential behavioral problems. The provision also implicitly authorizes school officials to consult with OSPI regarding their concerns about particular students. In this process, the school personnel must be able to discuss highly personal matters, which may reasonably be offensive to the certificate candidate in another context. But the candidate waives his right to object to those discussions on the grounds of invasion of privacy once he identifies himself as a potential candidate for teacher certification. Gonzaga did not invade John Doe's privacy to any greater degree than what the WAC provision contemplates. Therefore, we reverse the invasion of privacy judgment.

C. 42 U.S.C. § 1983

Gonzaga next argues that the court erred in refusing to grant it a directed verdict on the 42 U.S.C. § 1983 claim. Gonzaga argues that it cannot be liable under 42 U.S.C. § 1983 because the federal law at issue, Family Educational Rights and Privacy Act (FERPA), does not create any right or privilege that private individuals can enforce under § 1983. Again, we agree.

The Federal Civil Rights Act, 42 U.S.C. § 1983, provides for a private cause of action when a state violates certain federal statutory rights. *See Maine v. Thiboutot,* 448 U.S. 1, 4, 100 S.Ct. 2502, 2504, 65 L.Ed.2d 555 (1980). Section 1983 provides a remedy for violation of federally conferred rights, not simply violation of federal law. *See Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 509, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990).

A court must ask three questions in deciding whether a federal statute gives rise to an enforceable right under § 1983:

(1) whether the provision in question was intended to benefit the plaintiff; (2) whether the right protected by the statute is so "vague and amorphous" that its enforcement would strain judicial competence; and (3) whether the statute imposes a binding obligation on the state. *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 509, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990); *Blessing v. Freestone,* 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997).

The question before us is whether FERPA creates a federal right that individuals can enforce under § 1983. U.S. Supreme Court case law provides guidance in answering this question. In *Wright v. City of Roanoke Redev. and Hous. Auth.,* 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987), the Court considered whether the Brooke Amendment gave rise to individual rights enforceable under § 1983. The Brooke Amendment and its implementing regulations imposed a ceiling on the rent which public housing projects could charge low-income tenants. The regulations defined rent to include charges to tenants for " 'reasonable amounts of utilities,' " and defined how that amount would be determined. *Wright,* 479 U.S. at 420-21 n.3, 107 S.Ct. 766 quoting 24 CFR § 860.403 (1982). The Court held that the law was intended to benefit tenants, who could therefore sue to enforce the law under § 1983. *Wright,* 479 U.S. at 432, 107 S.Ct. 766. In *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990), the Court considered whether the Boren Amendment to the Medicaid Act created individual rights enforceable under § 1983. The Boren Amendment required the states to reimburse Medicaid providers according to rates that were " 'reasonable and adequate' " to meet the costs of " 'efficiently and economically operated facilities.' " *Wilder,* 496 U.S. at 503, 110 S.Ct. 2510, quoting 42 U.S.C. § 1396 (1982). Again the Court held that the law was intended to benefit providers seeking reimbursement, who could therefore challenge the state's rates by suing under § 1983. In both *Wilder* and

Wright, the laws at issue were enforceable under § 1983 because they were intended to provide particular and well-defined benefits to the plaintiffs.

In two later cases, however, the Court held that certain federal laws did not confer substantive rights on the plaintiffs. In *Suter v. Artist M.,* 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992), the Court considered whether private individuals had the right to enforce by suit a provision of the Adoption Assistance and Child Welfare Act of 1980. The act required participating states to submit a plan to the Secretary of Health and Human Services. The plan had to provide that the state would make "reasonable efforts" to avoid removing children from their homes, and to return children to their homes. *Suter,* 503 U.S. at 351, 112 S.Ct. 1360. The Court held that the act did not create an enforceable right under § 1983 because the term "reasonable efforts" imposed "only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary." *Suter,* 503 U.S. at 363, 112 S.Ct. 1360. In *Blessing v. Freestone,* 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997), custodial parents whose children were eligible to receive child support services from the state pursuant to Title IV-D of the Social Security Act, sued the director of Arizona's child support agency under § 1983. The act required participating states to certify that they would operate a child support enforcement program in "substantial compliance" with the act, and would submit a detailed plan to the Secretary of Health and Human Services. The Court held that the act did not create individual rights enforceable under § 1983 because:

> [f]ar from creating an individual entitlement to services, the ['substantial compliance'] standard is simply a yardstick for the Secretary to measure the system-wide performance of a State's Title IV-D program. Thus, the Secretary must look to the aggregate services provided by the State, not to whether the needs of any particular person have been satisfied.

Blessing, 520 U.S. at 343, 117 S.Ct. 1353. In both *Suter* and *Blessing,* the federal laws at issue did not create individual substantive rights enforceable against the states because they were not intended to confer particular benefits on the plaintiffs.

The case currently before us is more akin to *Suter* and *Blessing* than to *Wilder* and *Wright.* The federal law at issue, FERPA, provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . or personally identifiable information contained therein . . . of students without the written consent of their parents." 20 U.S.C. § 1232g(b). Like the federal law at issue in *Blessing,* FERPA requires participating schools to have in place a system-wide plan; the law is not intended to ensure that "the needs of any particular person have been satisfied." *Blessing,* 520 U.S. at 343, 117 S.Ct. 1353. We hold FERPA does not create individual rights privately enforceable under 42 U.S.C. § 1983. Therefore, we reverse the 42 U.S.C. § 1983 judgment.

Furthermore, even if FERPA did create individual rights enforceable under § 1983, we would nonetheless hold that a teacher candidate waives those rights when he or she applies for teacher certification. WAC 180-75-082 requires the candidate to file an affidavit from the school of education as a precondition for the state's award of a teacher certificate. In the affidavit, the dean must certify that he or she and several faculty members who know the applicant have "no knowledge that the applicant has a history of any serious behavioral problems." WAC 180-75-082. Moreover, the WAC provision implicitly authorizes school officials to contact OSPI directly with questions regarding the

certification process. This process necessarily entitles the school to release personally identifiable information to OSPI. Gonzaga's actions did not exceed its authority in this case.

D. Breach of Contract

Gonzaga finally argues that it is entitled to judgment as a matter of law on the breach of contract claim. Gonzaga argues that any implied agreement between John Doe and Gonzaga does not apply to moral character affidavits. Once again, we agree.

In its student handbook, Gonzaga states that the admission of a student to the university constitutes an "agreement of mutual responsibility." The "student's obligation is to accept the published policies of the University and to act in a manner consistent with these policies." In return, "the University's responsibility is to provide an environment in which the student's educational goals may be achieved." In the same paragraph, Gonzaga further states that it "recognizes its obligation to provide students with an opportunity to be heard in matters affecting their welfare." In another section, the handbook also specifies that the university will follow certain notice and hearing procedures when disciplining students who misbehave. John Doe's theory at trial was that Gonzaga breached this "agreement" by failing to discuss the sexual assault allegations with him before reaching a final decision not to issue him an affidavit.

Without addressing whether the student handbook creates any enforceable substantive or procedural rights with respect to purely internal issues, we hold that the student handbook does not confer substantive or procedural rights with respect to WAC 180-75-082(3), which governs Gonzaga's responsibilities to the state in regard to the moral character affidavit of applicants for teacher certification. Therefore, Gonzaga is entitled to judgment on the contract claim as a

matter of law, and we reverse the award for breach of contract.

Even if we did not reach this result, we would nonetheless strike the contract damages as duplicative. The jury was instructed to consider only economic injury in deciding how much compensation to award on the breach of contract claim. The only economic injury that John Doe alleged was the injury to his career resulting from Gonzaga's release of his name to OSPI, and its decision not to sign the moral character affidavit. These injuries flowed directly from the allegedly defamatory communications. Therefore, the contract damages duplicate the defamation damages.

EVIDENTIARY AND DISCOVERY ISSUES

A. Work Product Documents

Gonzaga argues that the trial court abused its discretion in ordering it to disclose, and admitting into evidence, four documents that Gonzaga personnel prepared at the direction of corporate counsel. In his cross-appeal, John Doe argues that the court erred in refusing to impose sanctions on Gonzaga for its failure to produce one of those documents.

1. Discoverability

John Doe sought to discover four documents that certain Gonzaga employees had prepared in anticipation of litigation in this case. Of greatest concern here is a six-page chronology that Roberta League and Susan Kyle prepared, which listed relevant dates and the events that occurred on those dates. Gonzaga argued below that the chronology was not discoverable because it was protected by attorney-client privilege. The trial court disagreed, characterizing the document as work product. The court allowed discovery of the document, finding that John Doe had substantial need for it and could not obtain the information that it contained in

any other way. Gonzaga argues again on appeal that the documents are privileged.

Documents prepared by a client or his or her attorney "in anticipation of litigation" are characterized as work product. CR 26(b)(4). Work product is not discoverable unless the party seeking discovery can show that he "has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." CR 26(b)(4). John Doe concedes that the four documents are work product. We cannot say that the trial court abused its discretion in determining the issues of "substantial need" or "undue hardship." We therefore affirm these rulings by the trial court.

Because John Doe now is familiar with the documents, and can obtain the information they contain by deposing the relevant witnesses, he cannot show substantial need for them on remand. Gonzaga is not required to produce them on remand, and the documents remain privileged and inadmissible.

2. Discovery Sanctions

In his cross-appeal, John Doe argues that the trial court should have imposed sanctions on Gonzaga for failing to produce the chronology in response to an interrogatory. We review sanctions decisions for abuse of discretion. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 338, 858 P.2d 1054 (1993). We hold that the trial court abused its discretion here.

Upon completion of early discovery in this case, John Doe pieced together an initial chronology of Gonzaga's internal meetings and communications regarding the sexual abuse allegations. John Doe then provided Gonzaga with this chronology, along with an interrogatory asking Gonzaga to

identify any communications and meetings not reflected in the chronology. Gonzaga did not answer the interrogatory, claiming that it was "unduly burdensome [and] oppressive." Gonzaga assured John Doe that he already had all the information he needed to answer the interrogatory. Several years later, through an independent motion, John Doe's counsel finally received the chronology at issue. John Doe claims the chronology contained numerous references to meetings that Gonzaga had not previously disclosed, requiring him to re-depose two witnesses. John Doe filed a CR 26(g) motion for sanctions. The trial court found that John Doe had suffered no harm because he ultimately obtained possession of the chronology; the court therefore denied the motion for sanctions.

The relevant rule here is CR 26(g), which requires an attorney to respond to a discovery request after making "reasonable inquiry," and to certify that the response is: (1) consistent with the rules, (2) not interposed for any improper purpose, and (3) not unreasonable or unduly burdensome or expensive. Whether an attorney has made a reasonable inquiry is to be judged by an objective standard. *Fisons*, 122 Wash.2d at 343, 858 P.2d 1054. The purpose of CR 26(g) is to encourage a "spirit of cooperation and forthrightness during the discovery process." *Fisons*, 122 Wash.2d at 342, 858 P.2d 1054. Sanctions are mandatory if the court finds that a party violated the rule. *Fisons*, 122 Wash.2d at 346, 858 P.2d 1054.

Here, the record reflects that Gonzaga responded to the interrogatory without making reasonable inquiry. Gonzaga's counsel could have responded to the interrogatory by asking his clients to provide a chronology of relevant events based on their own knowledge. After all, Roberta League had already prepared a chronology for Gonzaga. Gonzaga's response was also misleading. Relying on Gonzaga's assurances that he already had all the relevant information,

John Doe did not move to compel a response. Gonzaga's response was inconsistent with the spirit and intent of the rules. The court therefore abused its discretion in failing to impose a sanction, and is ordered to impose an appropriate sanction on remand.

In determining an appropriate sanction, the trial court has wide latitude. *Fisons,* 122 Wash.2d at 356, 858 P.2d 1054. The court must impose the least severe sanction that will be adequate to serve its purposes, but the sanction should not be so minimal that it undermines those purposes. *Fisons,* 122 Wash.2d at 356, 858 P.2d 1054. The purposes of sanctions are to deter, to punish, to compensate and to educate. *Fisons,* 122 Wash.2d at 356, 858 P.2d 1054.

B. Settlement Agreement

Gonzaga next argues that the trial court abused its discretion in refusing to admit the settlement agreement between John Doe and Jane Doe. Gonzaga claims the settlement agreement is relevant in determining the credibility of Jane Doe's testimony. We agree.

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *State v. Lynch,* 58 Wash. App. 83, 792 P.2d 167 (1990).

According to ER 408, evidence of a settlement agreement is not admissible to prove whether a party is liable on a particular claim. But the rule "does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness." ER 408. The purpose of the rule is to encourage parties to make whatever admissions may lead to a successful compromise without sacrificing portions of their case in the event these efforts fail. Comment ER 408.

Here, John Doe's and Jane Doe's settlement agreement and release provides that John Doe may resume his lawsuit

against Jane Doe if any new evidence surfaces suggesting that Jane Doe has accused him of sexual assault. The agreement therefore is probative of the truth of Jane Doe's claims in her videotaped testimony that John Doe never assaulted her. Furthermore, Gonzaga did not offer the settlement agreement as a means of proving Jane Doe's liability; she was no longer a party to the lawsuit. ER 408 allows admission of a settlement agreement for Gonzaga's intended purpose – to prove Jane Doe's bias. Therefore, the trial court abused its discretion in excluding the settlement agreement. The court is instructed to admit evidence of the agreement on remand.

C. Impeachment Evidence

Gonzaga argues that the trial court abused its discretion in refusing under ER613 to allow Gonzaga to admit the testimony of two witnesses who were disclosed late into the trial. Gonzaga offered the testimony for the purposes of proving that Jane Doe had made prior statements inconsistent with her deposition testimony at trial. However, we need not reach this issue in light of our decision to remand the case.

CONCLUSION

We reverse and remand for a new trial on the defamation claim. On remand, the trial court must include a *Prins* jury instruction. The court must also define "reckless disregard" for the jury in a manner that makes clear the subjective nature of that standard. We reverse the negligence, invasion of privacy, 42 U.S.C. § 1983, and breach of contract judgments. On remand, Gonzaga need not produce the four work product documents. The settlement agreement between Jane Doe and John Doe, and the testimony of Ashlock and Green, are admissible.

REVERSED and REMANDED.

AGID, A.C.J., and ELLINGTON, J., concur.